

United States  
Circuit Court of Appeals <sup>5</sup>

For the Ninth Circuit.

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ONE BIG SIX STUDEBAKER AUTOMOBILE,  
TOOLS AND ACCESSORIES, and  
HARVEY NOBLE,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,  
Defendant in Error.

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Transcript of Record.

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Upon Writ of Error to the United States District Court  
of the District of Montana.

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FILED

NOV 21 1922 |

F. D. MONCKTON,  
CLERK.



United States  
Circuit Court of Appeals

For the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## Names and Addresses of Attorneys of Record.

Messrs. FREEMAN, THELEN & FRARY, of  
Great Falls, Montana,

Attorneys for Intervenor and Plaintiff in  
Error.

JOHN L. SLATTERY, Esq., United States At-  
torney, RONALD HIGGINS, Esq., Assistant  
U. S. Attorney, W. H. MEIGS, Esq., Assistant  
United States Attorney, all of Helena, Mon-  
tana,

Attorneys for Libelant and Defendant in  
Error. [1\*]

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In the District Court of the United States in and  
for the District of Montana.

No. 965.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE BIG SIX STUDEBAKER AUTOMOBILE,  
etc., and HARVEY NOBLE,

Libelees;

CHARLES ZUCKERMAN,

Intervenor.

BE IT REMEMBERED, that on November 26,  
1921, a libel of information was filed herein, which  
is in the words and figures following, to wit: [2]

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\*Page-number appearing at foot of page of original certified  
Transcript of Record.

In the District Court of the United States, District  
of Montana, Great Falls Division.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE BIG SIX STUDEBAKER AUTOMOBILE,

One Motor Meter, Two Jacks, Two Hammers,  
Three Pliers, One Rim Wrench, One Tool  
Kit, Two Chains, Four Wrenches, One Oil  
Gun, One Wheel Puller, One Five-gallon  
Gasoline Can, One Set Side Curtains, One  
Screw-driver, One Chisel, Two Spare Tires,  
One Rim Lug, and HARVEY NOBLE,

Libelees.

**Libel of Information.**

BE IT REMEMBERED, that John L. Slattery,  
United States Attorney for the District of Mon-  
tana, who, for the United States, in its behalf  
prosecutes, comes here in person into the District  
Court of the United States for the District of Mon-  
tana, and informs the Court and gives it to under-  
stand:

That the United States of America brings suit  
against that certain conveyance, to wit, One Big  
Six Studebaker Automobile, Model 1919, Serial No.  
295019, Engine No. C. F. 2933, Montana State  
License No. 19521, and one motor meter, two jacks,  
two hammers, three pliers, one rim wrench, one tool  
kit, two chains, four wrenches, one oil gun, one



wheel puller, one five-gallon gasoline can, one set side curtains, one screw-driver, one chisel, two spare tires, one rim lug, hereinafter mentioned as tools and accessories, which said automobile and said tools and accessories are now in the hands of O. H. P. Shelley, Supervising Federal Prohibition Director, and an officer of the United States, at Great Falls, in the State and District of Montana, having been seized by Bob Gordon, Sheriff of Cascade County, at Great Falls, in said State and District of Montana, and which said conveyance and said tools and accessories the said Bob Gordon did on the 8th day of October, 1921, seize and secure as liable to seizure and forfeiture under the provisions of the Internal Revenue Laws of the United States, [3] said conveyance being then and there used in the removal of goods and commodities, to wit, distilled spirits, in respect whereof a tax is imposed by law, and which said tax was then and had theretofore been imposed by law, and was due and owing to the United States, and had not been paid, with the intent to defraud the United States of such tax.

That the United States Attorney alleges and particularly propounds as grounds and cause for said forfeiture:

1. On or about the 8th day of October, 1921, at a point about fifteen miles north of the city of Great Falls, in the State and District of Montana, Harvey Noble, did then and there wrongfully and unlawfully remove, and was concerned in removing, by means of One Big Six Studebaker Automobile, Model 1919, Serial No. 295019, Engine No.

4 *One Big Six Studebaker Automobile, etc., et al.,*

C. F. 2933, Montana State License No. 19521, a quantity of distilled spirits, the exact quantity and character of which is to the libelant unknown, on which said distilled spirits a tax was and had theretofore been imposed by law, to wit, the Internal Revenue tax on distilled spirits, and which said tax had not been paid, and was then and there due and owing and unpaid to the United States of America, then and there intending to defraud the said United States of the said tax on the said distilled spirits, so removed as last aforesaid.

2. That the said Harvey Noble claims some right, title or interest in and to the said conveyance, to wit, One Big Six Studebaker Automobile, Model 1919, Serial No. 295019, Engine No. C. F. 2933, Montana State License No. 19521, used in the removal of the said distilled spirits, and which contained said distilled spirits, and to said tools and accessories, and to said goods and commodities, the exact quantity and character of which is to the libelant unknown.

3. That said conveyance, to wit, One Big Six Studebaker Automobile Model 1919, Serial No. 295019, Engine No. C. F. 2933, Montana State License No. 19521, was seized on the 8th day of October, 1921, as liable to seizure and forfeiture under the provisions of the Internal Revenue Laws of the United States, by Bob Gordon, Sheriff of Cascade County, in said State and District of Montana, for the reason that the said conveyance had been, and then was being, used in the unlawful [4] removal of distilled spirits aforesaid.

4. That said conveyance, to wit, One Big Six Studebaker Automobile, Model 1919, Serial No. 295019, Engine No. C. F. 2933, Montana State License No. 19521, and said tools and accessories, are now subject to seizure.

WHEREFORE, the said United States Attorney for the District of Montana, who prosecutes as aforesaid for the United States, prays that due process of law may be awarded in this behalf, to enforce the forfeiture of the said conveyance, to wit, One Big Six Studebaker Automobile, Model 1919, Serial No. 295019, Engine No. C. F. 2933, Montana State License No. 19521, and said tools and accessories, so seized as aforesaid, and to give notice to all persons concerned to appear on the return date of said process, to show cause, if any they have, why said forfeiture should not be adjudged.

JOHN L. SLATTERY,  
United States Attorney, District of Montana. [5]  
United States of America,  
District of Montana,—ss.

John L. Slattery, being first duly sworn, on oath, deposes and says:

That he is the duly appointed, qualified and acting United States Attorney, for the District of Montana, and as such makes this verification to the foregoing libel of information; that he knows the contents thereof, and the same is true to the best of his knowledge, information and belief.

JOHN L. SLATTERY.

Subscribed and sworn to before me this 25th day of November, 1921.

[Seal] L. R. POLGLASE,  
Deputy Clerk, United States District Court, District of Montana.

Filed Nov. 26, 1921. C. R. Garlow, Clerk. [6]

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Thereafter, on November 26, 1921, an order was duly made and entered herein in the words and figures following, to wit:

In the District Court of the United States, District of Montana, Great Falls Division.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE BIG SIX STUDEBAKER AUTOMOBILE,

One Motor Meter, Two Jacks, Two Hammers,  
Three Pliers, One Rim Wrench, One Tool  
Kit, Two Chains, Four Wrenches, One Oil  
Gun, One Wheel Puller, One Five-gallon  
Gasoline Can, One Set Side Curtains, One  
Screw-driver, One Chisel, Two Spare Tires,  
One Rim Lug, and HARVEY NOBLE,

Libelees.

### **Order for Issuance of Process.**

A libel of information having been filed in the above-entitled court in the above-entitled cause, on the 26th day of November, 1921, and being fully advised of the law and the facts, and it

appearing therefrom to be a proper cause, now, therefore,

It is hereby considered and ordered by the Court:

I.

That process in due form of law issue against the property described in said libel of information, and that all persons interested in said described property and the libelees be cited to file answer to said libel of information, setting forth their interest in or claim to said property libelled, if any they have, with the Clerk of this Court, in the City of Great Falls, in the State and District of Montana, on or before the 20th day of December, 1921, which said day is hereby fixed as the return day thereof.

II.

That notice hereof be given to all persons interested in said property, by causing the substance of said libel, with the order of [7] Court setting the time and place appointed in which to file answer to said libel, and the place appointed for the trial and hearing of said libel of information be published in the "Great Falls Tribune," a newspaper of general circulation published at Great Falls, in the State and District of Montana, and near the place where said property was seized, and by posting the same in three public places in the City of Great Falls, in the State and District of Montana, for the period of fourteen (14) days prior to the time set for said return day.



8 *One Big Six Studebaker Automobile, etc., et al.,*

Dated this 26th day of November, 1921.

BOURQUIN,

Judge.

Filed Nov. 26, 1921. C. R. Garlow, Clerk. [8]

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Thereafter, on Nov. 26, 1921, a warrant of arrest and monition was duly issued herein, which with the Marshal's return thereon is in the words and figures following, to wit:

In the District Court of the United States, District of Montana, Great Falls Division.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE BIG SIX STUDEBAKER AUTOMOBILE,

One Motor Meter, Two Jacks, Two Hammers,  
Three Pliers, One Rim Wrench, One Tool  
Kit, Two Chains, Four Wrenches, One Oil  
Gun, One Wheel Puller, One Five-gallon  
Gasoline Can, One Set Side Curtains, One  
Screw-driver, One Chisel, Two Spare Tires,  
One Rim Lug, and HARVEY NOBLE,

Libelees.

**Warrant of Arrest and Monition.**

The President of the United States of America, to the Marshal of said United States, District of Montana, GREETING:

WHEREAS, a libel of information has been filed in the District Court of the United States for

the District of Montana, on the 26th day of November, 1921, by the United States of America, against one Big Six Studebaker Automobile, Model 1919, Serial No. 295019, Engine No. C. F. 2933, Montana State License No. 19521, and one motor meter, two jacks, two hammers, three pliers, one rim wrench, one tool kit, two chains, four wrenches, one oil gun, one wheel puller, one five-gallon gasoline can, one set side curtains, one screw-driver, one chisel, two spare tires, one rim lug, hereinafter mentioned as tools and accessories are now in the possession and custody of O. H. P. Shelley, Supervising Federal Prohibition Director, and an officer of the United States, in the State and District of Montana, claimed as forfeited to the United States, in that, the said Studebaker Big Six Automobile was used in the removal of a [9] quantity of whiskey, the exact quantity of which is to the libelant unknown, and for the disposition and concealment thereof, with intent to defraud the United States of the tax imposed under the Internal Revenue Laws of the United States upon said whiskey, praying the issuance of process in due form of law in that behalf made, and that all persons interested in said Big Six Studebaker Automobile, or other property hereinbefore described, be cited in general and special to answer the premises and all proceedings being had with the said Big Six Studebaker Automobile, or other property, for the causes of said libel mentioned, be condemned and forfeited to the United States.

You are, therefore, hereby commanded to arrest and attach the aforesaid Big Six Studebaker Automobile, and other property hereinbefore described, and to hold the same in your custody until the further order of this Court respecting the same, and to give due notice of such seizure to said Harvey Noble, claimant herein, and all other persons claiming the same or knowing or having anything to say why the aforesaid Big Six Studebaker Automobile, and other property, should not be condemned and forfeited, pursuant to the prayer of the said libelant, and that they be cited to file answer to said libel of information, setting forth their interest in or claim to said property libeled, if any they have, with the Clerk of Court, in the City of Great Falls, in the State and District of Montana, on or before the 20th day of December, 1921, by causing the substance of such libel and order to be published in the "Great Falls Tribune," a newspaper of general circulation published at Great Falls, in the State and District of Montana, and near the place of seizure, and by posting up the same in three of the most public places in Great Falls, in the State and District of Montana, for the space of fourteen (14) days, and what you shall have done in the premises do you then make return thereon, together with this writ.

WITNESS the Honorable GEORGE M. BOURQUIN, Judge of said Court at the City of Butte, in



the State and District of Montana, this [10] 26th day of November, 1921.

[Seal]

C. R. GARLOW,

Clerk of the United States District Court, District of Montana.

By L. R. Polglase,  
Deputy.

Filed December 29, 1921. C. R. Garlow, Clerk.  
[11]

In the District Court of the United States, District of Montana, Great Falls Division.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE BIG SIX STUDEBAKER AUTOMOBILE,  
One Motor Meter, Two Jacks, Two Hammers,  
Three Pliers, One Rim Wrench, One Tool Kit,  
Two Chains, Four Wrenches, One Oil Gun, One  
Wheel Puller, One Five-gallon Gasoline Can,  
One Set Side Curtains, One Screw-driver, One  
Chisel, Two Spare Tires, One Rim Lug, and  
HARVEY NOBLE,

Libelees.

**Notice of Seizure and Time and Place of Trial  
and Hearing.**

To Harvey Noble, and All Others Whom It may  
Concern:

Notice is hereby given that a libel of information  
was filed in the above-entitled court in the above-

entitled cause, on the 26th day of November, 1921, wherein and whereby it is sought to have certain property described as follows, to wit, One Big Six Studebaker Automobile, Model 1919, Serial No. 295019, Engine No. C. F. 2933, Montana State License No. 19521, and one motor meter, two jacks, two hammers, three pliers, one rim wrench, one tool kit, two chains, four wrenches, one oil gun, one wheel puller, one five-gallon gasoline can, one set side curtains, one screw-driver, one chisel, two spare tires, one rim lug, hereinafter mentioned as tools and accessories, seized on the 8th day of October, 1921, at a point about fifteen miles north of the City of Great Falls, in the State and District of Montana, by Bob Gordon, Sheriff of Cascade [12] County, and an officer of the law, at Great Falls, in said State and District of Montana, and heretofore attached and arrested and held and seized, and now in possession of O. H. P. Shelley, Supervising Federal Prohibition Director, in said State and District of Montana, forfeited for the following reasons, to wit:

1. On or about the 8th day of October, 1921, at a point about fifteen miles north of the City of Great Falls, in the State and District of Montana, Harvey Noble did then and there wrongfully and unlawfully remove, and was concerned in removing, by means of One Big Six Studebaker Automobile, Model 1919, Serial No. 295019, Engine No. C. F. 2933, Montana State License No. 19521, a quantity of distilled spirits, the exact quantity of which is to the libelant unknown, on which said distilled

spirits a tax was and had theretofore been imposed by law, to wit, the Internal Revenue Tax on distilled spirits, and which said tax had not been paid, and was then and there due, owing and unpaid to the United States of America, he, the said Harvey Noble, then and there intending to defraud the said United States of the said tax on the said distilled spirits, so removed as last aforesaid.

2. That the said Harvey Noble claims some right, title or interest in and to the said conveyance, to wit, One Big Six Studebaker Automobile, Model 1919, Serial No. 295019, Engine No. C. F. 2933, Montana State License No. 19521, used in the removal of the said distilled spirits, and which contained said distilled spirits, and to said tools and accessories, and to said goods and commodities, the exact quantity and character of which is to the libellant unknown.

3. That said conveyance, to wit, One Big Six Studebaker Automobile, Model 1919, Serial No. 295019, Engine No. C. F. 2933, Montana State License No. 19521, was seized on the 8th day of October, 1921, as liable to seizure and forfeiture under the provisions of the Internal Revenue Laws of the United States, by Bob Gordon, Sheriff of Cascade County, in said State and District of Montana, for the reason that the said conveyance had been, and then was being, used in the unlawful removal of distilled spirits [13] aforesaid.

4. That said conveyance, to wit, One Big Six Studebaker Automobile, Model 1919, Serial No. 295019, Engine No. C. F. 2933, Montana State Li-

14 *One Big Six Studebaker Automobile, etc., et al.,*  
cense No. 19521, and said tools and accessories, are  
now subject to seizure.

That by order of the Court said libel of information has been set for trial and hearing before the above-entitled court at the courtroom thereof, in the City of Great Falls, in the State and District of Montana, and all persons interested in said described property and the libelees be cited to file answer to said libel of information, setting forth their interest in or claim to said property libelled, if any they have, with the Clerk of this court, in the City of Great Falls, in the State and District of Montana, on or before the 20th day of December, 1921, which said day is hereby fixed as the return day thereof.

Dated this 26th day of November, 1921.

JOSEPH L. ASBRIDGE,  
United States Marshal for the District of Montana.

[14]

#### PUBLISHER'S AFFIDAVIT.

State of Montana,  
County of Cascade,—ss.

Before me, the undersigned, a notary public, this day personally came Leonard G. Diehl, who, being first duly sworn, according to law, says that he is the business manager of "The Tribune," a daily newspaper published at Great Falls, Montana, in said county and State, and that the publication, of which the annexed is a true copy, was published in said paper on the 2d day of December, 1921, and that the rate charged therefor is not in excess of

the commercial rates charged private individuals, with the usual discounts.

LEONARD G. DIEHL.

Subscribed and sworn to before me this 27th day of December, 1921.

[Seal]

H. R. AYER,

Notary Public for the State of Montana, Residing at Great Falls, Montana.

My commission expires Oct. 6, 1923.

(Copy foregoing Notice Attached.) [15]

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE BIG SIX STUDEBAKER AUTOMOBILE,  
etc., and HARVEY NOBLE,

Libelees.

**Marshal's Return to Warrant of Arrest and  
Monition.**

I hereby certify and return that I received the within warrant of arrest and monition at Helena, Montana, December 2, 1921, and executed the same by arresting the therein described automobile at Helena, Montana, on the said 2d day of December, 1921, by taking the said automobile into custody and appointing Mr. R. C. Huffman, proprietor of the Central Garage, Helena, Montana, custodian of said car and leaving a copy of said warrant and monition with said Mr. Huffman; that I caused



16 *One Big Six Studebaker Automobile, etc., et al.,*  
to be published in the "Great Falls Tribune," a  
newspaper of general circulation published daily  
at Great Falls, Montana, Notice of Seizure and  
Time and Place of Trial and Hearing, a copy of  
which notice aforesaid is hereto attached and made  
a part of this return; that I also caused to be posted  
at three public and conspicuous places at Great  
Falls, Montana, copies of said notice.

Dated December 28, 1921.

JOSEPH L. ASBRIDGE,

United States Marshal.

By N. E. Baynham,

Deputy.

Filed Dec. 29, 1921. C. R. Garlow, Clerk. [16]

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Thereafter, on December 21, 1921, a petition to  
intervene was filed herein by Charles Zuckerman,  
which is in the words and figures following, to wit:  
In the District Court of the United States, in and  
for the District of Montana.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE BIG SIX STUDEBAKER AUTOMOBILE,  
One Motor Meter, Two Jacks, Two Hammers,  
Three Pliers, One Rim Wrench, One Tool Kit,  
Two Chains, Four Wrenches, One Oil Gun,  
One Wheel Puller, One Five-gallon Gasoline

Can, One Set Side Curtains, One Screw Driver,  
One Chisel, Two Spare Tires, One Rim Lug,  
and HARVEY NOBLE,

Libelees,

and

CHARLES ZUCKERMAN,

Defendant and Intervenor.

### **Petition in Intervention.**

To the Honorable GEO. M. BOURQUIN, Judge of  
the District Court of the United States for the  
District of Montana:

Comes now Chas. Zuckerman, and shows to this  
Honorable Court as follows:

#### **FIRST.**

That the above-entitled action is now pending in  
the above-entitled court for the forfeiture of One  
Big Six Studebaker automobile, Model 1919, serial  
No. 295019, Engine No. C. F. 2933, and the tools  
and accessories in connection with the said libel of  
information, having been filed in the above-entitled  
court, and has not as yet proceeded to judgment.

#### **SECOND.**

That your petitioner has a lien upon said car on  
account of a certain chattel mortgage made and  
given by one Harvey Noble to your petitioner, and  
which said chattel mortgage has been filed in the  
[17] office of the County Clerk and Recorder of  
Cascade County, Montana. That by reason of the  
failure of the said Harvey Noble to perform the  
conditions set forth in said chattel mortgage or  
make the payment provided for therein, that your

18 *One Big Six Studebaker Automobile, etc., et al.,*  
petitioner is entitled to the possession of the said  
automobile.

THIRD.

That the claims of the United States of America  
and libelant in this action, are made adversely to  
petitioner's title and right of possession, and peti-  
tioner desires to litigate the question directly with  
said libelant.

WHEREFORE, petitioner prays that he be al-  
lowed to come in as a party defendant in this ac-  
tion, and that he be permitted to file his answer  
to the said libel of information.

CHARLES ZUCKERMAN.

State of Montana,  
County of Cascade,—ss.

Charles Zuckerman, being first duly sworn on  
oath deposes and says, that he is the petitioner and  
defendant in the above-entitled action; that he has  
heard read the foregoing petition and knows  
the contents thereof, and that the same is true of  
his own knowledge except as to those matters and  
things therein alleged, upon information and belief,  
and as to those he believes them to be true.

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Subscribed and sworn to before me this 20th  
day of Dec. 1921.

[Seal] JOHN N. THELEN,  
Notary Public, for the State of Montana, Residing  
at Great Falls, Montana.

My commission expires Sept. 13, 1922.



Service of the within petition in intervention together with copy thereof is hereby admitted this 20th day of December, 1921.

W. H. MEIGS,  
Asst. U. S. Atty.

Filed December 21, 1921. C. R. Garlow, Clerk.  
[18]

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Thereafter, on December 21, 1921, answer of intervenor was filed herein, in the words and figures following, to wit:

In the District Court of the United States, in and  
for the District of Montana.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE BIG SIX STUDEBAKER AUTOMOBILE,  
One Motor Meter, Two Jacks, Two Hammers,  
Three Pliers, One Rim Wrench, One Tool Kit,  
Two Chains, Four Wrenches, One Oil Gun, One  
Wheel Puller, One Five-Gallon Gasoline Can,  
One Set Side Curtains, One Screw-driver, One  
Chisel, Two Spare Tires, One Rim Lug, and  
HARVEY NOBLE,

Libelee,

and

CHARLES ZUCKERMAN,

Defendant and Intervenor.

**Answer of Defendant and Intervenor.**

Comes now Chas. Zuckerman, after leave of Court

first had and obtained, and file this, his answer to the libel of information, and admits, alleges and denies as follows:

FIRST.

Answering paragraph one (1) this answering defendant denies each and every matter, allegation and thing contained and set forth therein.

SECOND.

Answering paragraphs two (2), three (3), and four (4), of said libel of information, this answering defendant alleges that he does not have sufficient knowledge to form a belief, and therefore denies the same.

THIRD.

Further answering said libel of information, this defendant denies each and every other matter, allegation and thing contained and set forth therein, and heretofore expressly admitted, modified or denied. [19]

II.

Further answering said libel of information, and as his first, separate and further defense to the same, this answering defendant admits, alleges and denies as follows:

FIRST.

That under date of Sept. 22, 1921, this answering defendant sold the said Studebaker automobile, Serial No. 295019 and Engine No. C. F. 2933, together with the equipment and tools used in connection therewith, and being the same automobile mentioned and described in the libel of information to one Harvey Noble, and at the time

of said sale, took from said Harvey Noble a chattel mortgage upon the said car and equipment and tools to secure the balance of the purchase money, and which said chattel mortgage was duly filed in the office of the County Clerk and Recorder of Cascade County, Montana, on the 28th day of September, 1921.

### SECOND.

That this defendant is still the owner and holder of the aforesaid mentioned chattel mortgage, and promissory note secured thereby, and the amount due on said promissory note has not been paid to this defendant by the said Harvey Noble, or by anyone in behalf of the said Harvey Noble, and that under and by virtue of the terms and conditions of the said chattel mortgage, and by reason of the failure of the said Harvey Noble to perform the conditions of the said chattel mortgage, and make the payments provided for therein, this defendant is entitled to the possession of the said automobile.

### THIRD.

That defendant further alleges that the said automobile was not used to convey or remove, and also not concerned in the removal of the distilled spirits, to wit, distilled spirits in respect whereof, as tax was imposed by the internal revenue laws of the United States of America, and which said tax the said Harvey Noble, libelee, was then and there intending to defraud the United States of America of the payment thereof, and defendant further alleges that there was no distilled spirits or liquors upon

which the tax was not paid, being covered by the said car at the time the same was seized. [20]

FOURTH.

Defendant further alleges that the said automobile was not being used to convey distilled spirits or liquors upon which a tax was not paid, and further alleges that the said automobile was not engaged in the transportation or conveyance of any distilled spirits at all.

FIFTH.

This defendant further alleges upon information and belief that any taxes to the United States of America upon any distilled spirits if there were any distilled spirits, in the said car, as set forth in said libel of information, having been fully paid to the said United States of America, long prior to the 8th day of October, 1921, and defendant further alleges that the said car is wrongfully and unlawfully seized and withheld, without cause or reason therefor.

WHEREFORE, being fully answered, this defendant prays that the libel do not have the relief as prayed for in the said libel of information, and that this answering defendant be decreed the owner of the said Studebaker automobile aforesaid, and entitled to the possession thereof.

FREEMAN, THELEN & FRARY.

Attorneys for Answering Defendant and Intervenor. [21]

State of Montana,  
County of Cascade,—ss.

Charles Zuckerman, being first duly sworn, on oath deposes and says: That he is the defendant and intervenor in the above-entitled action: That he has heard read the foregoing answer, and knows the contents thereof, and that the same is true of his own knowledge except as to those matters and things therein alleged, upon information and belief, and as to those he believes them to be true.

CHARLES ZUCKERMAN.

Subscribed and sworn to before me this 20th day of December, 1921.

[Seal]

JOHN N. THELEN,

Notary Public for the State of Montana, Residing  
at Great Falls, Montana.

My commission expires Sept. 13, 1922.

Service of copy of the within answer admitted this 20th day of December, 1921, together with copy.

W. H. MEIGS,  
Asst. U. S. Atty.

Filed December 21, 1921. C. R. Garlow, Clerk.

[22]



Thereafter, on March 14, 1922, supplemental answer of defendant and intervenor was duly filed herein, in the words and figures following to wit:

In the District Court of the United States in and  
for the District of Montana.

**UNITED STATES OF AMERICA,**

Libellant,

vs.

**ONE BIG SIX STUDEBAKER AUTOMOBILE,**

One Motor Meter, Two Jacks, Two Hammers,  
Three Pliers, One Rim Wrench, One Tool  
Kit, Two Chains, Four Wrenches, One Oil  
Gun, One Wheel Puller, One Five-gallon  
Gasoline Can, One Set Side Curtains, One  
Screw-driver, One Chisel, Two Spare Tires,  
One Rim Lug, and HARVEY NOBLE,

Libelee,

and

**CHARLES ZUCKERMAN,**

Defendant and Intervenor.

**Supplemental Answer of Defendant and Inter-  
venor.**

Now comes Charles Zuckerman, defendant and intervenor, and files this, his supplemental answer to the libel of information, and admits, alleges and denies as follows:

**FIRST.**

Answering paragraph One (1) this answering

defendant denies each and every allegation, matter and thing contained and set forth therein.

## SECOND.

Answering paragraphs Two (2), Three (3) and Four (4), of said libel of information, this answering defendant alleges that he does not have sufficient knowledge or information to form a belief, and therefore denies the same.

## THIRD.

Further answering said libel of information, this defendant denies each and every allegation, matter and thing contained and set [23] forth in said libel of information save and except as the same is hereinafter or heretofore specifically admitted, modified or denied.

## II.

Further answering said libel of information, and as his first, separate and further defense to the same, this answering defendant, admits, alleges and denies as follows:

## FIRST.

That under date of September 22d, 1921, this answering defendant sold the said Studebaker automobile, Serial No. 295019 and Engine No. C. F. 2933, together with the equipment and tools used in connection therewith, and being the same automobile mentioned and described in the libel of information, to one Harvey Noble, and at the time of the said sale, took from the said Harvey Noble a chattel mortgage upon the said car and equipment and tools to secure the balance of the purchase money, and which said chattel mortgage was duly

filed in the office of the County Clerk and Recorder of Cascade County, Montana, on the 28th day of September, 1921.

### SECOND.

That this defendant is still the owner and holder of the aforesaid mentioned chattel mortgage, and promissory note secured thereby, and the amount due on said promissory note has not been paid to this defendant by the said Harvey Noble, or by anyone in behalf of the said Harvey Noble, and that under and by virtue of the terms and conditions of the said chattel mortgage, and by reason of the failure of the said Harvey Noble to perform the conditions of the said chattel mortgage, and make the payments provided for therein, this defendant is entitled to the possession of the said automobile.

### THIRD.

Defendant further alleges that the said automobile was not used to convey or remove, and was not concerned in the removal of distilled spirits, to wit: Distilled spirits in respect whereof, a tax was imposed by the Internal Revenue laws of the United States of America, and which said tax the said Harvey Noble, libelee was then and there intending to defraud the United States of America of the payment [24] thereof, and defendant further alleges that there were no distilled spirits or liquors upon which the tax was not paid, being conveyed by the said car at the time the same was seized, or at all.

### FOURTH.

Defendant further alleges that the said auto-



mobile was not being used to convey distilled spirits or liquors upon which a tax was not paid, and further alleges that the said automobile was not engaged in the transportation or conveyance of any distilled spirits at all.

### FIFTH.

This defendant further alleges upon information and belief that any taxes due the United States of America upon any distilled spirits, if there were any distilled spirits in the said car as set forth in the said libel of information, have been fully paid to the United States of America long prior to the 8th day of October, 1921, and defendant further alleges that the said car is wrongfully and unlawfully seized and withheld without cause or reason therefor.

### III.

Further answering said libel of information, and as his second separate and further defense to the same, this answering defendant alleges as follows:

### FIRST.

That the said automobile, being one Big Six Studebaker Automobile, and accessories mentioned as one of the defendants in this action, if the same automobile and accessories to which reference is made in a certain criminal action entitled the United States of America vs. Harvey Noble, and the Harvey Noble mentioned as one of the defendants in this action, is the same and identical Harvey Noble mentioned in a criminal action entitled the United States of America vs. Harvey Noble, which said criminal action was tried in the District Court

of the United States, Fourth District of Montana, at the March, 1922, term of the said Court, and that in the said criminal action the said Harvey Noble being one of the defendants in this action was charged by information with having wrongfully and unlawfully transported intoxicating liquors without then and there first obtaining the permit from the [25] Commissioner of Internal Revenue so to do, contrary to the form of the Statute in such case made and provided, and also that he wrongfully and unlawfully transported intoxicating liquors without making at the time a permanent record thereof, showing in detail the amount and kind of liquor transported together with the names and addresses of the consignee and consignor, and the time and place of such transportation, contrary to the form of the statute in such case made and provided, and that on the 8th day of October, 1921, the said Harvey Noble in the County of Cascade and in the County of Chouteau, in the State and District of Montana, and within the jurisdiction of this Court, did then and there wrongfully and unlawfully have and possess intoxicating liquor, intended for use, in violation of the National Prohibition Act, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America, which said information is hereto attached and made a part hereof, and reference thereto is hereby made.

## SECOND.

That all of the violations of the Internal Revenue law set forth in the libel of information filed in

this action, or the intent to defraud the Government as is complained of in the libel of information, filed in this action, might have been established if said allegations be true, at the trial of the criminal action hereinbefore referred to herein, wherein the United States of America was plaintiff and Harvey Noble was defendant, and that all of the evidence which would be necessary to establish, and competent under the various assignments and charges of fraud set out in plaintiff's libel of information herein, would also be competent and would tend to establish the allegations of the said criminal information; that the various charges of fraud and causes of forfeiture alleged by the plaintiff herein, relate to the same subject matter and are based upon the same transaction as the various allegations in said criminal information contained, and that at the time when said criminal information was drawn by the attorney for the United States, and at the time it was considered by him, all of the facts which would be competent to sustain the allegations of plaintiff's libel of information, were known to, and in the possession of the representative of the United States. [26]

### THIRD.

That the United States ought not now maintain its action herein for the penalty or for the relief demanded in the said libel of information, for at the March, 1922, term, in this court and district, a criminal information (the same above referred to), was found against the United States and in favor of the said Harvey Noble; that the counts in

the said criminal information contain practically the same charges, or are based upon the same charges in substance and effect, and are the same allegations of offenses and fraud and unlawful removal of intoxicating liquors as set forth in the libel of information in this action, and are founded upon the same transaction and the same facts, and under the same circumstances as the matters and things herein alleged in plaintiff's libel.

That all of the facts and circumstances, and all and singular of said matters at said term and in this court, were tried and inquired into and fully heard in said criminal action hereinabove referred to, and on the hearing thereof, the jury duly impaneled and sworn found this defendant not guilty, and the Court rendered a judgment acquitting this defendant of the charges set forth in said criminal information, hereto attached and made a part hereof and hereby referred to, and all of which constitutes the same removal of liquor or transportation of liquor, and facts and circumstances surrounding the same as are now set out by plaintiff herein, and herein answered by this defendant.

#### FOURTH.

That the automobile referred to in the criminal action, driven by the defendant, Harvey Noble, and made a defendant in this libel of information, is the same and identical car, and that the said Harvey Noble, defendant in this action, is the same and identical person as the Harvey Noble mentioned in the said criminal action heretofore referred to, and the said Harvey Noble is the same

and identical Harvey Noble referred to in this action, who is the owner of the said automobile, having purchased the same from this answering defendant, and having given a [27] chattel mortgage thereon to this defendant for the balance of the purchase price.

WHEREFORE, having fully answered this defendant prays that the libel do not have the relief as prayed for in the said libel of information; that the said action be dismissed and held for naught, and that this answering defendant be decreed entitled to the possession of the said automobile in question.

FREEMAN, THELEN & FRARY,  
Attorneys for Defendant and Intervenor.

United States of America,  
District of Montana,  
County of Cascade,—ss.

Charles Zuckerman, being first duly sworn, on oath deposes and says: That he is the defendant and intervenor in the above-entitled action; that he has heard read the foregoing supplemental answer and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters and things therein alleged upon information and belief, and as to those he believes it to be true.

CHARLES ZUCKERMAN.



Subscribed and sworn to before me this 14th day of March, 1922.

[Seal]

JOHN N. THELEN,  
Notary Public for the State of Montana, Residing  
at Great Falls, Montana.

My commission expires Sept. 13, 1922. [28]

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In the District Court of the United States, for  
the District of Montana, Great Falls Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARVEY NOBLE,

Defendant.

**Information.**

BE IT REMEMBERED, that W. H. Meigs, Assistant United States Attorney for the District of Montana, who for the said United States, in its behalf, prosecutes in his own person, comes here into the District Court of the United States for the District of Montana, on the 22d day of November, 1921, in the September, 1921, term of court, held at the City of Butte, in the State and District of Montana, and for the United States of America gives the court to understand and be informed.

That on or about the 8th day of October, 1921, one Harvey Noble, whose true name is to the informant unknown, in the County of Cascade, and in the County of Choteau, in the State and District of Montana, and within the jurisdiction of this

Court, did then and there wrongfully, and unlawfully transport intoxicating liquor, the exact quantity and character of which is to the informant unknown, without then and there first obtaining a permit from the Commissioner of Internal Revenue so to do; contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the United States of America.

### SECOND COUNT.

And the informant aforesaid further gives the court to understand and be informed:

That on or about the 8th day of October, 1921, said Harvey Noble, whose true name is to the informant unknown, in the County of Cascade, [29] and in the County of Choteau, in the State and District of Montana, and within the jurisdiction of this Court, did then and there wrongfully and unlawfully transport intoxicating liquor, the exact quantity and character of which is to the informant unknown, without making at the time a permanent record thereof, showing in detail the amount and kind of liquor transported, together with the names and addresses of the consignor and consignee, and the time and place of such transportation; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

### THIRD COUNT.

And the informant aforesaid further gives the court to understand and be informed:

That on or about the 8th day of October, 1921, said Harvey Noble, whose true name is to the infor-

mant unknown, in the County of Cascade, and in the County of Chouteau, in the State and District of Montana, and within the jurisdiction of this Court, did then and there wrongfully and unlawfully have and possess intoxicating liquor, intended for use in violation of the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

(Signed) W. H. MEIGS,  
Assistant United States Attorney, District of  
Montana. [30]

United States of America,  
District of Montana,—ss.

W. H. Meigs, being first duly sworn, on oath deposes and says:

That he is a duly appointed, qualified and acting Assistant United States Attorney for the District of Montana, and as such makes this verification to the foregoing information; that he knows the contents thereof, and that the same is true to the best of his knowledge, information and belief; the said information being obtained from the transcript of proceedings held before W. S. Frary, a United States Commissioner for the District of Montana, and on file in this Court, and who, after due examination, found that there was probable cause to hold the defendant herein to bail.

(Signed) W. H. MEIGS.



Subscribed and sworn to before me this 22d day of November, 1921.

[Seal] (Signed) C. R. GARLOW,  
Clerk U. S. District Court, District of Montana.  
Service hereof admitted March 14, 1922.

JOHN L. SLATTERY,  
Attorney for Libelant.

Filed March 14, 1922. C. R. Garlow, Clerk.  
[31]

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Thereafter, on March 15, 1922, said cause was duly tried and submitted to the Court, the record thereof being in the words and figures following, to wit:

In the District Court of the United States in and for the District of Montana.

No. 965.

UNITED STATES

vs.

ONE STUDEBAKER AUTO and HARVEY  
NOBLE.

**Trial.**

This cause came on regularly for trial this day, Ronald Higgins, Esq., and W. H. Meigs, Esq., Assistant U. S. Attorneys, appearing for the United States, and J. N. Thelen, Esq., appearing for the libelees. Dudley Crowther, stenographer.

Thereupon counsel in open court waived jury trial. Thereupon counsel for libelees moved the

action be dismissed upon the ground the libel of information does not state facts sufficient to constitute a cause of action; that Sec. 3450, R. S. U. S., has been repealed by the National Prohibition Act, and that the Court is without jurisdiction of the cause; and further, that this action be dismissed upon the ground that the verdict and judgment of acquittal in the criminal action against the defendant Harvey Noble is a bar to this action, which motion was denied and exception noted.

Thereupon it was stipulated and agreed by counsel in open court, that this cause be submitted to the Court upon the evidence in the criminal action of United States vs. Harvey Noble with such additional proof as either side may desire to offer.

Thereupon Harry M. Dengler, O. H. P. Shelley, and J. J. O'Mahoney were sworn and examined as witnesses for the United States, whereupon the United States rested. Thereupon Charles Zuckerman was sworn and examined as a witness for libelees, a certain mortgage marked Exhibit "A" introduced, whereupon libelees rested. Thereupon the cause was argued, submitted to the court and taken under advisement, the parties being granted a few days to file briefs.

Entered in open court March 15, 1922.

C. R. GARLOW,

Clerk. [32]

Thereafter on May 25, 1922, the decision of the Court was duly filed herein, being in the words and figures following, to wit:

In the District Court of the United States in and  
for the District of Montana.

No. 965.

UNITED STATES

vs.

ONE BIG SIX STUDEBAKER and NOBLE,  
Libelees,

and

ZUCKERMAN, Intervenor.

**Decision.**

This is the usual libel invoking the forfeiture imposed by section 3450, R. S. (Comp. St., sec. 6352), for removal of distilled spirits with intent to defraud plaintiff of taxes thereon. Alleging Noble of some interest in the auto used it for the removal aforesaid, he is joined as libelee. The usual notice was published, and Noble made default. Zuckerman intervened, denying the user aforesaid, and alleging that Noble owns the auto, that intervenor owns a mortgage lien upon the auto and of date prior to the transactions or acts involved, and that in respect to the latter and in this court, Noble has been charged, tried and acquitted of transporting intoxicating liquor without the permit and record required by the National Prohibition Act and of

possessing such liquor with intent to use it in violation of said act.

Upon trial to the court, counsel stipulates that Noble has been charged, tried and acquitted as aforesaid, and that the evidence in that trial be submitted in evidence in this.

From that evidence it appears that the auto, transportation and liquors imputed to Noble in the former trial are those imputed to him in this, that in the former trial the plaintiff presented evidence tending to prove that Noble possessed and transported the liquor in circumstances of no permit had and no record made, and that Noble's defense in the former was not that he had a permit and made a record, but was that he neither possessed nor transported the [33] liquor. It is intervenor's contention that the verdict and judgment in the former trial necessarily determine that Noble neither possessed nor transported the liquor, that those issues are now *res judicata*, and that to retry them herein is to violate the rule of twice in jeopardy. In support he relies upon Coffey's Case, 116 U. S. 443, wherein Coffey's acquittal upon a trial for the crime denounced by sec. 3450 was held to bar proceedings against him and his property for the forfeiture consequent upon the crime. This is not that case. There, was identity in fact and law; here, is difference in both.

Noble might be not guilty of any or all of the offenses of the former trial and yet be guilty of the offense of the instant proceedings or *vice versa*.

The only fact conclusively proven in the former trial is that Noble was not guilty beyond reasonable doubt of any of the offenses therein charged. Hence, neither *res judicata* nor twice in jeopardy flows or accrues from said trial.

See Chantang Co. vs. Abaroa, 218 U. S. 481, 483.

Morgan vs. Davis, 237 U. S. 640.

U. S. vs. One Cole Auto, 273 Fed 936.

Furthermore, not only does Noble waive the plea, but it is not available to persons whose interest like intervenor's vests prior to the former suit to which they were not parties and out of which the plea might arise, for that they are not privy to the judgment and in consequence is no mutual estoppel

To revert to the evidence, at 1:00 A. M. Nov. 8, 1921, at a point twelve miles from Great Falls on the highway from said city to Canada, two deputy sheriffs in an auto traveling towards Canada met this auto driven by Noble whom they recognized, with him an unrecognized companion. Immediately following Noble was a Buick auto.

The officers passed both, promptly returned and repassed both, and about  $\frac{1}{4}$  to  $\frac{1}{2}$  mile ahead of the autos met the sheriff and another deputy in an auto, and the officers' cars stopped.

Thereupon Noble turned about and fled towards Canada, and the Buick turned off the road and across country. The sheriff with two of the deputies [34] pursued Noble, and the other deputy turned his car about and followed. Traveling 45 to 50 miles per hour, in 3 or 4 miles the sheriff



overhauled Noble, lapped him and called stop, whereupon Noble veered more into the road and before the sheriff, compelling the latter to fall behind. A deputy then tried and failed to puncture Noble's gas tank by revolver fire. In 4 or 5 more miles the sheriff again overhauled Noble, and within 10 or 12 feet of the latter's car the deputy succeeded in puncturing the tank, the gasoline escaping.

Then, testifies the sheriff and two deputies, sacks were thrown from Noble's car, the sheriff's car running over one of them.

The sheriff saw three sacks, one deputy, three, and the other deputy, five. At a preliminary hearing a few days after the incident the sheriff testified he saw three sacks thrown, and in the instant trial testified to seeing two, changing to three as most likely, upon his attention called to his previous testimony aforesaid, while the deputy now testifying to seeing three sacks, at said hearing testified to two.

Falling back to avoid firing the escaping gasoline, the sheriff lost sight of Noble's auto, passed on, turned out his lights, returned and saw it with lights out in a field near a farm house. A few minutes later the deputy following arrived and had two sacks of Canadian bottled whiskey and gin, one sack badly broken, found in the road. The sheriff then seized Noble's auto, Noble and his companion having disappeared. Two of the deputies returned over the road to Great Falls, and looking for more sacks but found none, probably because



of weeds along the road in connection with darkness. The sheriff remained in the vicinity, placing Noble's car across the road. About daylight the Buick in which were Stewart, Ernest and Prescott returned, the horn was blown, and followed by the sheriff they halted at Noble's car. Virtually in the sheriff's custody, in discussion with him Stewart and Ernest admitted they had a load of Canadian whiskey and gin in the Buick at the time of the chase which they had taken to and deposited in Great Falls. The sheriff doubtful of his ability to prove the facts, agreed to receive the liquors and [35] allow Stewart and Ernest to go with the Buick, Prescott stipulating that the arrangement would also "clean" him.

It appears Prescott was manager of a garage in Great Falls which was conducted by Noble, vice-president of the owning company, sometimes patronized by Stewart and Ernest. The latter escaping as aforesaid with the load of liquors went to the garage, and Prescott took them to his residence where the liquors were deposited in the basement.

Stewart and Ernest claimed they had but seven cases and delivered only that number to the sheriff, then disappearing with the Buick. A few days later Noble sought out the sheriff and with him discussed the status of the former's auto.

The sheriff delivered the auto to the Federal Agents, these proceedings were instituted Nov. 26, 1921, and hearing was had March —, 1922. The evidence further is that the sacks and liquors found in the road are like those delivered to the sheriff

by Stewart, Ernest and Prescott, that there was no permit for importation of the liquors, and no taxes for importation had been paid upon them, and that during the chase were some dust, wind, and tumbleweeds rolling.

In behalf of the intervenor the evidence is that Stewart and Noble in the Buick brought from Canada twenty-five cases of Canadian bottled whiskey and gin, in nineteen sacks, that twenty-five miles out of Great Falls their gasoline failed, that by a passing rancher they sent to Noble's garage a request for delivery to them five gallons of gasoline, that Noble took it to them in this auto, intervenor going along for the ride, that neither Noble nor intervenor had interest in or positive knowledge that the Buick was loaded with liquors, that none of the liquors were transferred to or were in Noble's auto, that intervenor has but one arm and no sacks were thrown from the auto, that when they fled from the officers they thought the latter were robbers or "highjackers," that Noble ran off the road thinking to secure protection at the farm house but found it vacant, that Noble and [36] intervenor arriving in Great Falls in the forenoon after the chase, Noble at the garage learned the pursuers were officers, and went home to bed and slept till next day, that three times he called at the court house to see the sheriff, finally one evening finding him at the jail, that intervenor made no complaint to the police of loss of the car, but learned from the police and papers the official character of the pursuers, that Prescott allowed the

liquors to be stored in his basement because the garage was a public place, that Stewart and Ernest were two sacks short, likely fallen out thru a defective door of the Buick, and Prescott went with them to look for the sacks because it was too early for breakfast or work, and for the ride.

That the two sacks of liquors later found by the deputy, were thrown from Noble's auto during the chase, is established by a preponderance of the evidence. Intervenor's contention that they had fallen from the Buick, and that what the officers saw were tumbleweeds blown across the road and accepted by them for sacks when the deputy appeared with sacks found upon the road of the chase, is untenable in view of all the circumstances. It is believed the officers saw what they testify they saw.

Everything persuades the flight and its strategy were with knowledge of the official character of the pursuers and to escape the consequences of guilty conduct. The pursued fled before the chase started. They were on the underground route for liquors, with liquors, and beyond doubt were anticipating to avoid vigilant officers, more likely to suddenly appear than "highjackers" or robbers.

If Noble had no liquor, he had no reason to fear "highjackers" and fear of robbers was unreasonable. These parties are not of fearsome nature. The demeanor and testimony of Noble and Stewart were bold, arrogant, flippant, verging upon the insolent and defiant.

The impression created is of untrustworthiness and discredibility. Stewart and Ernest had made many incriminating statements involving Noble.

Both subpoenaed by the government in Noble's trial, only Stewart [37] was called. Admitting the statements aforesaid, he jeeringly declared they were false and to deceive the officers, and with gross insolence and palpable falsehood sought to persuade that the officers had been in negotiations with him and Ernest for the officers' personal advantage in respect to the liquors and this auto.

Stewart thus treacherous, Ernest was called by Noble, and retracted his statements aforesaid, even as Stewart did. It is noted the statements of Stewart and Ernest incriminating Noble serve only to impeach their contrary statements at the trial, are not otherwise evidence herein.

It is significant they knew they were pursued by officers, that Stewart, Ernest and Prescott deposited the liquors in the latter's basement. If Noble was captured there was fear of search of the garage, and so the liquors were thus concealed. And the immediate return to the scene of the chase by these three was prompted not by search for two lost sacks or desire to ride, but to discover the fate of Noble and to serve him if practicable. If Noble had not known the officers, the natural thing would have been for him, if innocent, strong in the consciousness of it, to at once call up the Sheriff, to set both right, to recover his car.

But he did not. He first consulted counsel. Why? And only met the sheriff after some days



and without appointment or call but by personal journeys, he says, to find him. Intervenor's interest, his pretense of fear of robbers, for it is that, his failure to notify officers because "wasn't my car," and the impression created on the witness-stand, tend to restrain credit for his testimony. For the defense it is accepted, however, that Noble did deliver gasoline to Stewart and Ernest about 25 miles out of great Falls on the Canada high-road, whether or not the expedition to Canada was shared in by him.

That is where Noble received the sacks of liquors. He received them in circumstances of their character and origin, of men and methods, and of time and place that would apprise any intelligent person [38] they were being unlawfully imported, avoiding governmental knowledge, supervision and dues, and with intent to defraud Government of unpaid import taxes, internal and customs, to both of which the liquors are subject by law to the knowledge of all men. More reason had Noble to know these facts, and he did know them. In brief, Noble knew the liquors were in process of smuggling from Canada. Participating to success therein, aiding Stewart and Ernest to continue their unlawful acts, removing some of the liquors, the intent, amongst others unlawful, to defraud the plaintiff of the taxes unpaid and due is imputed to him as a reasonable inference established by a preponderance of the evidence. The Court so finds.

See in respect to intent Lillienthal's Case, 97

46 *One Big Six Studebaker Automobile, etc., et al.*,  
U. S. 264, 268; Ellis vs. U. S. 206, U. S. 257; U. S.  
vs. Kirby, 7 Wall. 486.

The auto is forfeited and condemned, and an appropriate decree will be entered.

May 25, 1922.

BOURQUIN, J.

Filed May 25, 1922. C. R. Garlow, Clerk. [39]

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Thereafter on May 29, 1922, a decree was duly given and filed herein, being in the words and figures following, to wit:

In the District Court of the United States, District of Montana, Great Falls Division.

IN EQUITY—No. 965.

UNITED STATES OF AMERICA,

Libellant,

vs.

ONE BIG SIX STUDEBAKER AUTOMOBILE,  
Tools and Accessories, and HARVEY NOBLE,

Libelees,

and

CHARLES ZUCKERMAN,

Defendant and Intervenor.

**Decree.**

This cause came on regularly for trial on the 15th day of March, 1921. The United States of



America, Libelant, appeared by its attorneys, John L. Slattery, Esquire, Assistant United States Attorney, and Ronald Higgins, Esquire, Assistant United States Attorney, for the District of Montana. The libelee, Harvey Noble, and the intervenor, Charles Zuckerman, appeared by John N. Thelen, Esquire. The said cause was tried to the Court sitting without a jury, a jury having been expressly waived in open court by the respective counsel for the above-named parties. Whereupon, it was further agreed, in open court, by the said respective counsel for the above-named parties, that the evidence introduced, taken and transcribed in the criminal cause, No. 3926, United States of America vs. Harvey Noble, should be taken and considered as evidence in this cause. Thereupon, additional evidence was submitted on behalf of the libelant and the libelee and intervenor, and after argument of counsel the cause was submitted to the Court, and was thereupon taken under advisement by the Court.

Thereafter, and on the 25th day of May, 1922, the Court being fully advised in the premises, rendered its decision herein and finds:

That all the allegations contained in the libel of information herein are true; that the automobile and tools and accessories [40] described in the libel of information herein became forfeited to the United States of America, on the 8th day of November, 1921; that the United States of America is entitled to a decree forfeiting the said automo-

bile, tools and accessories, as of said 8th day of November, 1921.

Wherefore, by reason of the premises and by virtue of the law, it is hereby ordered, adjudged and decreed, that the automobile described in the libel of information herein, to wit, One Big Six Studebaker Automobile, Model 1919, serial No. 295019, Engine No. C. F. 2933, Montana State License No. 19521, Engine No. C. F. 2933, Montana State License No. 19521, and one motor meter, two jacks, two hammers, three pliers, one rim wrench, one tool kit, two chains, four wrenches, one oil gun, one wheel puller, one five-gallon gasoline can, one set side curtains, one screw-driver, one chisel, two spare tires, and one rim lug, be, and the same are hereby condemned and forfeited to the United States of America; and that the same be sold at a public place in the City of Helena, in the State and District of Montana, at public auction, at a time and place to be set by the United States Marshal, in that behalf, for cash, by said United States Marshal for the District of Montana; that the said marshal shall give fifteen days notice of such sale by advertising in the "Montana Record Herald," a newspaper of general circulation, printed and published in the city of Helena in the State and District of Montana, the same being a newspaper published nearest the said place of sale; and shall within ten days after such sale pay the proceeds thereof to the Clerk of this court, after deducting all proper charges and costs incurred herein, to be allowed by this Court.

It is further ordered, adjudged and decreed, that the United States of America, libelant, do have and recover of and from Harvey Noble, libelee, and from Charles Zuckerman, intervenor herein, its costs and disbursements herein, hereby taxed and allowed in the sum of Thirty and 70/100 Dollars (\$30.70).

Done in open court this 29th day of May, 1922.

BOURQUIN, Judge.

Filed May 29, 1922. Entered June 1, 1922. C. R. Garlow, Clerk. [41]

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Thereafter, on August 1, 1922, bill of exceptions was duly signed, settled and allowed by the Court and filed herein, being in the words and figures following to wit: [42]

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In the District Court of the United States, for the District of Montana.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE BIG SIX STUDEBAKER AUTOMOBILE,  
Tools and Accessories, and HARVEY NO-  
BLE,

Libelee,

and

CHARLES ZUCKERMAN,

Defendant and Intervenor.

### **Bill of Exceptions.**

BE IT REMEMBERED, that heretofore, to wit, on the 25th day of November, 1921, there was presented and filed in this court, a libel of information against the libelees, which said libel is in words and figures as follows, to wit: (Here insert libel of information.)

That thereafter, on the — day of December, 1921, this defendant and intervenor was granted permission by the Honorable Court to file his answer, which said answer is in words and figures as follows, to wit: (Here insert answer of defendant and intervenor.)

That thereafter, on the 14th day of March, 1922, there was presented and filed in this court, the supplemental answer of defendant and intervenor, which said supplemental answer is in words and figures as follows, to wit: (Here insert supplemental answer of defendant and intervenor.)

That thereafter, on the 15th day of March, 1922, this cause came on regularly for trial in the above-entitled court, before the Honorable George M. Bourquin, Judge presiding. When the following proceedings were had, to wit, the jury being waived, and it being stipulated between the counsels of record, that the evidence, judgment-roll and proceedings had in the criminal action of the United States of America vs. Harvey Noble, be introduced and considered in this case, supplemented by any additional evidence that the parties to this action wish to introduce.

The evidence taken and entered in the case of the United States vs. Harvey Noble, being case No. 3926, is not herein set forth by reason of the fact that there is no contention on the part of this defendant, but that the evidence would justify the Court in his findings of fact, as contained in his opinion filed herein, and set forth, the contention of the defendant being that the verdict of not guilty, in the case of United States of America vs. Harvey Noble, being case No. 3926, is a complete bar to the United States in this proceeding, to ask and [43] demand forfeiture of the automobile and accessories, in which it is alleged, contained intoxicating liquors, as set forth in the information in the case at hand, because of the fact that Noble's defense in the criminal action was not that he had a permit and made a permanent entry, but that he (Noble) neither possessed nor transported the liquor. The judgment-roll in the case of United States of America vs. Harvey Noble, No. 3926 is herewith set forth for the purpose of showing that this procedure is barred by the verdict of not guilty, in said criminal action, and which said judgment-roll is in words and figures as follows, to wit:



“In the District Court of the United States, District of Montana, Great Falls Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARVEY NOBLE,

Defendant.

### INFORMATION.

BE IT REMEMBERED, that W. H. Meigs, Assistant United States Attorney for the District of Montana, who for the said United States, in its behalf, prosecutes in his own person, comes here into the District Court of the United States for the District of Montana, on the 22d day of November, 1921, in the September, 1921, term of court, held at the City of Butte, in the State and District of Montana, and for the United States of America gives the Court to understand and be informed:

That on or about the 8th day of October, 1921, one Harvey Noble whose true name is to the informant unknown, in the County of Cascade and in the County of Chouteau, in the State and District of Montana, and within the jurisdiction of this Court, did then and there, wrongfully and unlawfully transport intoxicating liquor, the exact quantity and character of which is to the informant unknown, without then and there first obtaining a permit from the Commissioner of Internal Revenue so to do; contrary to the form of the Statute in



such case made and provided and against the peace and dignity of the United States of America.

SECOND COUNT. [44]

And the informant aforesaid further gives the Court to understand and be informed:

That on or about the 8th day of October, 1921, said Harvey Noble, whose true name is to the informant unknown, in the County of Cascade, and in the County of Chouteau, in the State and District of Montana, and within the jurisdiction of this Court, did then and there wrongfully and unlawfully transport intoxicating liquor, the exact quantity and character of which is to the informant unknown, without making at the time, a permanent record thereof, showing in detail the amount and kind of liquor transported, together with the names and addresses of the consignor and consignee, and the time and place of such transportation; contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the United States of America.

THIRD COUNT.

And the informant aforesaid, further gives the Court to understand and be informed:

That on or about the 8th day of October, 1921, said Harvey Noble, whose true name is to the informant unknown, in the County of Cascade, and in the County of Chouteau, in the State and District of Montana, and within the jurisdiction of this Court, did then and there wrongfully and unlawfully have and possess intoxicating liquor intended for use in violation of the National Prohi-

bition Act; contrary to the form of the Statute in such case made and provided and against the peace and dignity of the United States of America.

(Signed) W. H. MEIGS,  
Assistant United States Attorney, District of Montana.

United States of America,  
District of Montana,—ss.

W. H. Meigs, being first duly sworn, on oath, deposes and says:

That he is a duly appointed, qualified and acting Assistant United States Attorney for the District of Montana, and as such makes this verification [45] to the foregoing information; that he knows the contents thereof, and that the same is true to the best of his knowledge, information and belief; the said information being obtained from the transcript of proceedings held before W. S. Frary, a United States Commissioner for the District of Montana, and on file in this court, and who after due examination, found that there was probable cause to hold the defendant herein to bail.

(Signed) W. H. MEIGS.

Subscribed and sworn to before me this 22d day of November, 1921.

[Seal] C. R. GARLOW,  
Clerk of the District Court, District of Montana.

Filed November 22d, 1921. C. R. Garlow, Clerk.

In the District Court of the United States in and  
for the District of Montana.

No. 3926.

UNITED STATES

vs.

HARVEY NOBLE.

Defendant was duly called for arraignment this day, whereupon D. W. Doyle asked that the names of O'Leary & Doyle be entered as attorneys for defendant, and it was so ordered. Thereupon, said counsel waived the reading of the information and entered a plea of not guilty on behalf of said defendant. Thereafter, the case was ordered set for trial December 19, 1921, at 9:30 A. M.

Entered in open court December 1, 1921.

C. R. GARLOW,  
Clerk.

In the District Court of the United States in and  
for the District of Montana.

No. 3926.

UNITED STATES

vs.

HARVEY NOBLE.

This cause came on regularly for trial this day, defendant present with his attorney, J. N. Thelen, Esq., and Ronald Higgins, Esq., and W. H. Meigs, Esq., Assistant U. S. Attorneys, appearing for the United States. Dudley Crowther, Court reporter.

Thereupon the following were duly empanelled, accepted and sworn as a jury to try the cause, viz., John V. Carroll, G. L. Sleavy, C. R. Deck, Wm. Gerrard, L. E. [46] Stiles, W. J. Thomas, P. P. Auerbach, B. W. Porter, Chas. R. Elliott, William Enos, Emil Morgan and Gust Nordquist.

Thereupon, Bob Gordon, Guy Palagi, Fred Houtari, J. W. Leland, O. H. P. Shelley, and Alex Stuart were sworn and examined as witnesses for the United States, and two bottles of liquor and two sacks were introduced in evidence, whereupon the United States rested. Thereupon, Martin Ernest was sworn and examined as a witness for the defendant, whereupon further trial of cause was ordered continued until 9:30 A. M. to-morrow.

Entered in open court March 6, 1922.

C. R. GARLOW,  
Clerk.

In the District Court of the United States in and  
for the District of Montana.

No. 3926.

UNITED STATES

vs.

HARVEY NOBLE.

Defendant and respective counsel, with the jury, present as before, and trial of cause resumed. Thereupon, Martin Ernest was recalled as a witness for defendant, and H. A. Prescott, Herman Mauer, Charles Zuckerman, Frank B. Brown, Louis Kommers, John L. Slattery, Harvey Noble, W. S. Frary

and Fred Woehner were sworn and examined as witnesses for defendant, the Court records in case No. 965, United States vs. One Studebaker Auto and Noble, were offered in evidence by defendant to show the contents of the automobile, and were admitted in evidence to that extent, whereupon, defendant rested. Thereupon, Bob Gordon and Guy Palagi, were recalled and testified for plaintiff in rebuttal, Alex Remneas was sworn and examined as a witness in rebuttal, and J. W. Leland and O. H. P. Shelley were recalled as witnesses in rebuttal, whereupon plaintiff rested and the evidence closed. Thereupon after the arguments of counsel and the instructions of the Court, the Jury retired to consider of its verdict. The Marshal was ordered to furnish meals and lodging to the jurors and two bailiffs in charge of said jury. Thereafter, at 8:00 P. M. the jury returned into court with its verdict, which was duly received by the Court, read and filed, and by the jury acknowledged to be its true verdict as follows, to wit: 'We, the jury in the above-entitled cause, find the defendant not guilty, John V. Carroll, Foreman.' Thereupon, defendant was discharged. [47]

Entered in open court March 7, 1922.

C. R. GARLOW,  
Clerk.



In the District Court of the United States in and  
for the District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARVEY NOBLE,

Defendant.

**Verdict.**

We, the Jury, in the above-entitled cause, find  
the defendant not guilty.

JOHN V. CARROLL,

Foreman.

Filed March 7, 1922. C. R. Garlow, Clerk."

Thereafter, the following evidence was introduced on behalf of the United States and on behalf of the defendant, as follows, to wit:

The COURT.—You may proceed for the plaintiff.

Mr. THELEN.—At this time, your Honor, I understand that we agreed that the evidence that was introduced in the criminal action should be considered by your Honor in this action, with the additional evidence that the United States had, could be introduced at this time; and before that is done, however, I would like to make a motion. And I make the motion that the action be dismissed, on the ground that the libel of information does not state facts sufficient to constitute a cause of action, that the Internal Revenue Law, Section 3450, and the law under which the libel of informa-



tion has been brought, has been repealed by the Eighteenth Amendment, or what is commonly known as the Volstead Law, and that the Court is without jurisdiction in this case. Further, make a motion that the action [48] be dismissed upon the ground that the judgment of acquittal heretofore entered in this court, in which the United States of America was plaintiff and Harvey Noble was defendant, is a bar to this action, the same circumstances and the same facts, and all matters connected with the matter being the same as in this case, and the United States had full opportunity to bring out all of the evidence in that case that could possibly be used in this case. And for that reason, being a case similar to the present case and being only different in the fact that this is an action *in rem* and the other is a criminal action, we believe that this action would be barred by reason of the fact that the jury in the criminal action brought in a verdict of not guilty. There is a case that is in some respects like the present case, I believe; it seems to intimate that that is the law, at any rate, I believe, and that is the case of A. G. Coffey, Claimant, and others, plaintiffs, versus the United States. It is reported in the United States Supreme Court Reports, being—

The COURT.—The number of the United States Reporter?

Mr. THELEN.—116, page 684. We therefore ask that this action be dismissed on the grounds stated.

The COURT.—I assume your motion, in so far as it sets up the ground that the libel is insufficient, is based on your contention that 3450 is repealed?

Mr. THELEN.—Yes, your Honor.

The COURT.—No lack of any of the facts if the law is in existence?

Mr. THELEN.—That is my point, your Honor.

The COURT.—The motion, of course, will be made at any time; counsel will even get the benefit of it at the conclusion of the trial if he should persuade the Court that the law is with him. This point raised as to the judgment of acquittal in case of United States against Noble being *res adjudicata* and a bar to this action. I don't think the Coffey case would support that contention. If the criminal trial had been based on 3450, namely to penalize Noble by a fine [49] for removing the liquor with intent to defraud the United States of taxes, unquestionably, it would bar the forfeiture now involved in this case; but the charge in the other case, as I remember it, and for the purpose of the motion the Court will take into consideration, was that he was transporting liquor without a permit. Now, he might be innocent of transporting liquor without a permit, and yet he might be transporting it or removing it with the intent to defraud the United States of taxes; in other words, he might have had his permit, and thus entitled to his acquittal in the case in which he was tried, and yet he might have made use of the permit and transporting it to avoid tax. There are

different characters of offenses. At this time the motion will be denied.

Mr. THELEN.—Note an exception.

The COURT.—Let it be noted.

The COURT.—Do I understand this case will be tried on the evidence submitted in the case of United States vs. Noble, supplemented of course, if either party desires?

Mr. THELEN.—That is the understanding, your Honor.

The COURT.—Let the record show the fact. The Court has destroyed its notes, not knowing that this case was to come up.

### **Testimony of H. M. Dengler, for the Libelant.**

Whereupon H. M. DENGLER, witness, called upon and sworn on behalf of the libelant, testified as follows:

#### **Direct Examination.**

(By Mr. HIGGINS.)

My name is H. M. Dengler. I am an Internal Revenue Agent and also serving as a federal prohibition agent during the month of October, 1921, as well as an Internal Revenue Agent. I have been in the Internal Revenue service for four years lacking one month. My duties as such, are the collection of Internal Revenue with reference to income taxes and distilled spirit taxes and other taxes. There is nothing to indicate that an importation tax has been paid on the two [50] exhibits, one of which has a brand on the bottle marked "Sandy MacDonald Scotch Whiskey," the

(Testimony of H. M. Dengler.)

other of which has a brand on the bottle marked "James Burroughs, Limited, Dry Gin." The stamps on the bottles show that it was made outside of the United States, one of them in London, and the other in Scotland. They are consequently liquor of foreign manufacture. The Gin is 95.8 proof and the Scotch is 89.7 proof.

Cross-examination.

(By Mr. THELEN.)

I do not know whether the liquor was imported into the United States. I do not know but that any stamps that might be on there might have been removed or worn off after it was brought into the United States. I had the bottles in my custody from some time in October until the 14th day of November and the contents were not changed during that period. If it had been changed prior to that time, and after it was brought into the United States, I do not know anything about it. On liquor brought in from foreign countries under the Customs Act, there is a tax of \$2.60 a proof gallon, and under the Internal Revenue Act of 1918, there is a tax of \$2.20 a proof gallon if it is for nonbeverage medicinal purposes, and if brought in for beverage purposes without a permit, a tax of \$6.40 per proof gallon. The taxes are paid at the port of entry, I presume as it is a custom duty. The Internal Revenue tax would be paid to the collector of Internal Revenue. I made a search to ascertain if the tax was paid on these particular bottles, but it is hearsay to me as told by the customs offi-

(Testimony of H. M. Dengler.)

cers. The two bottles were brought in prior to October, and since the time they were manufactured. The contents could have been changed after that time, in so far as I know. There is no date of manufacture on these bottles altho there usually is. I do not know whether there should be a custom stamp on it or not, if it was brought in by the bottle, as I do not know the procedure of the customs officials. If the liquor was resold after it got into the United States for beverage purposes, the Internal Revenue tax of \$6.40 a gallon would become immediately due and payable to the collector of Internal Revenue who would issue a receipt for it; if entered as nonbeverage, a tax of \$2.20 a gallon would be due likewise. I do not know of my own knowledge, whether a receipt [51] was issued for this particular liquor.

**Testimony of O. H. P. Shelley, for the Libelant.**

Whereupon O. H. P. SHELLEY was called and sworn on behalf of the libelant, testified as follows:

Direct Examination.

(By Mr. HIGGINS.)

My name is O. H. P. Shelley, I am the Federal Prohibition Director for the District of Montana. I assumed that position September 1st, 1921. Since my incumbency in that office, I have not issued a permit to anyone for the importation of intoxicating liquor from Canada or any foreign country. I have not issued a permit to Harvey



(Testimony of O. H. P. Shelley.)

Noble, Martin Ernest, Stewart or Charles Zuckerman.

Cross-examination.

(By Mr. THELEN.)

I have not issued a permit since I have been in office for the importation of liquor from any foreign country. I am the only one that could issue such a permit in Montana. My district is for the State of Montana. The permit could not have been issued by anyone else in the State, for liquor to be brought into Montana.

**Testimony of J. J. O'Mahony, for the Libelant.**

Whereupon J. J. O'MAHONY, called and sworn on behalf of the libelant, testified as follows:

Direct Examination.

(By Mr. HIGGINS.)

My name is J. J. O'Mahony. I am Special Deputy Collector of Customs. I have served in that capacity for fifteen years. There was no tax paid by anyone for the importation of liquor into the District of Montana and Idaho, so far as I know. I keep the records of the office, and there has been no such payment made by Harvey Noble, Martin Ernest, Stewart or Charles Zuckerman.

Cross-examination.

(By Mr. THELEN.)

We do not issue permits for the importation of liquor for customs duties. We issue a receipt to the person who may pay duty on liquor, that is,

(Testimony of J. J. O'Mahony.)

[52] prior to September 9, 1917, but since that time, we have issued no receipts or permits to anyone for the reason that the importation of liquor is prohibited absolutely. We do not collect any duty at all since September 1st, 1917, but seize the liquor if any should be imported.

Redirect Examination.

(By Mr. HIGGINS.)

No permit has ever been presented to our office by anyone from the Federal Prohibition Director allowing the importation of liquor from any country, in the United States during the year 1921. If there is any tax due, that tax has not been paid, as there were no taxes paid for the importation of liquor during the year of 1921.

**Testimony of Charles Zuckerman, for the Defendant and Intervenor.**

Whereupon CHARLES ZUCKERMAN, a witness, called and sworn on behalf of the defendant and intervenor, testified as follows:

Direct Examination.

(By Mr. THELEN.)

My name is Charles Zuckerman. I testified in the action of the United States against Harvey Noble, with reference to having a mortgage on the car in the case, which is the same car as in this libel of information.

Q. I will hand you a paper and ask you if that is

a copy of the mortgage that you received on the car? A. Yes, sir.

(Marked Exhibit "A.")

Exhibit "A" of defendant offered in evidence. (Here insert Exhibit "A" of defendant.)

Mr. HIGGINS.—We object on the ground it is incompetent, because it constitutes no defense to this action.

The COURT.—That will be true if the Government makes out a case; and yet he may show his interest; it might involve some right of his in event you fail.

WITNESS.—The mortgage has not been paid, and I am still claiming the car under this mortgage.

No cross-examination. [53]

The COURT.—Anything further?

Mr. HIGGINS.—I believe not, your Honor; I believe that is all.

The COURT.—Incidentally, in reference to the testimony in the other case, did it show where the liquor came from?

Mr. MEIGS.—Yes, sir.

The COURT.—Do you desire to argue it?

(Argument.)

The COURT.—I am reminded, from the argument of the Government, the Court told the jury that the vital matter in the case was whether or not there was any liquor in the car of Noble; that if there was, there wasn't much doubt of his guilt; if there was not, in the jury's judgment, of course

there would be a verdict of not guilty. The jury found Not Guilty. Now, the question is, tentatively, whether or not their finding of not guilty does not involve the finding that there was nothing in the car and to the extent that makes it a matter once tried, not to be tried again,—*res adjudicata*. Even if the Coffey case is not controlling, I would be glad if both of you develop that and see what you can find in the cases. If we give the jury the benefit of an honest judgment—and we must—didn't they find that there was no liquor in that car, and if they did, is it settled once for all so far as this case is concerned? Both have that in mind and see if you can find anything to help the Court,—not saying the case entirely turns on that. It will be submitted.

In the District Court of the United States for the  
District of Montana.

No. 965.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE BIG SIX STUDEBAKER AUTOMOBILE,  
Tools and Accessories, and HARVEY NO-  
BLE,

Libelees,

and

CHARLES ZUCKERMAN,

Defendant and Intervenor.

**Opinion.** [54]

This is the usual libel invoking the forfeiture imposed by Sec. 3450, R. S. (Comp. Stats., Sec. 6352) for removal of distilled spirits with intent to defraud plaintiff of taxes thereon, alleging Noble of some interest in the auto, used for the removal aforesaid. He is joined as libelee. The usual notice was published, and Noble made default. Zuckerman intervened, denying the uses aforesaid, and alleging that Noble owns the auto, that intervenor owns a mortgage lien upon the auto and of date prior to the transactions or acts involved, and that in respect to the latter and in this Court, Noble has been charged, tried and acquitted of transporting intoxicating liquor without the permit and record required by the National Prohibition Act, and of possessing such liquor with intent to use it in violation of said act.

Upon trial to the Court, counsel stipulated that Noble has been charged, tried and acquitted as aforesaid, and that the evidence in that trial be submitted in evidence in this.

From that evidence, it appears that the auto transportation and liquors imputed to Noble in the former trial are those imputed to him in this, that in the former trial the plaintiff presented evidence tending to prove that Noble possessed and transported the liquor in circumstances of no permit had and no record made, and that Noble's defense in the former was not that he had a permit and



made a record, but was that he neither possessed nor transported the liquor. It is intervenor's contention that the verdict and judgment in the former trial necessarily determined that Noble neither possessed, nor transported the liquor, that those issues are now *res judicata*, and that to retry them herein is to violate the rule of twice in jeopardy. In support, he relies upon Coffey's case, 116 U. S. 443, wherein Coffey's acquittal upon a trial for the crime denounced by sec. 3450 was held to bar proceedings against him and his property, for the forfeiture consequent upon the crime. This is not that case. There, was identity in fact and law; here, is difference in both.

Noble might be not guilty of any or all the offenses of the former trial, and yet be guilty of the offense of the instant proceedings, or *vice versa*.  
[55]

The only fact conclusively proven in the former trial is that Noble was not guilty beyond reasonable doubt of any of the offenses therein charged. Hence, neither *res judicata* nor twice in jeopardy flows or accrues from said trial.

See *Chantagee vs. Abarea*, 218 U. S. 481-483.

*Morgan vs. Davis*, 237 U. S. 640.

*U. S. vs. One Cole Auto*, 273 Fed. 936.

Furthermore, not only does Noble waive the plea, but it is not available to persons whose interest like intervenor's vests prior to the former suit, to which they were not parties and out of which the plea might arise, for that they are not

privity to the judgment, and in consequence is not mutual estoppel.

To revert to the evidence, at 1:00 A. M. Nov. 8, 1921, at a point 12 miles from Great Falls, on the highway from said city to Canada, two deputy sheriffs in an auto traveling towards Canada, met this auto driven by Noble, whom they recognized, with him an unrecognized companion. Immediately following Noble was a Buick auto. The officers passed both, promptly returned and re-passed both, and about  $\frac{1}{4}$  to  $\frac{1}{2}$  mile ahead of the autos met the sheriff and another deputy in an auto, and the officers' car stopped.

Thereupon, Noble turned about and fled toward Canada, and the Buick turned off the road and across country. The sheriff, with two of the deputies pursued Noble, and the other deputy turned his car about and followed.

Traveling 45 to 50 miles per hour, in 3 or 4 miles the Sheriff overhauled Noble, lapped him, and called stop. Whereupon, Noble veered more into the road and before the Sheriff, compelling the latter to fall behind.

A deputy then tried and failed to puncture Noble's gas tank by revolver fire. In 4 or 5 miles, the Sheriff again overhauled Noble, and within 10 or 12 feet of the latter's car, the deputy succeeded in puncturing the tank, the gasoline escaping.

Then, testifies the Sheriff and two deputies, sacks were thrown from Noble's car, the sheriff's car

running over one of them. The Sheriff saw three sacks, one deputy, three, and another deputy, five. At a preliminary hearing a few [56] days after the incident, the Sheriff testified he saw three sacks thrown, and the instant trial testified to seeing two, changing to three, as most likely, upon his attention called to his previous testimony aforesaid, while the deputy now testifying to seeing three sacks, at said hearing testified to two.

Falling back to avoid firing the escaping gasoline, the Sheriff lost sight of Noble's auto, passed on, turned out his lights, returned and saw it with lights out in a field near a farm house. A few minutes later, the deputy following arrived and had two sacks of Canadian bottled whiskey, and gin, and one sack badly broken, found in the road. The Sheriff then seized Noble's auto, Noble and his companion having disappeared. Two of the deputies returned over the road to Great Falls, and looking for more sacks but found none, probably because of weeds along the road, in connection with darkness. The Sheriff remained in the vicinity, placing Noble's car across the road. About daylight, the Buick, in which were Stewart, Ernst and Prescott, returned, and the horn was blown, and followed by the Sheriff they halted at Noble's car.

Virtually, in the Sheriff's custody, in discussion with him, Stewart and Ernst admitted that they had a load of Canadian whiskey and gin, in the Buick at the time of the chase, which they had taken to and deposited in Great Falls. The Sheriff, doubtful of his ability to prove the facts, agreed

to receive the liquors and allow Stewart and Ernst to go with the Buick, Prescott stipulating that the arrangement would also "clean" him.

It appears Prescott was manager of a garage in Great Falls, which was conducted by Noble, vice-president of the owning company, sometimes patronized by Stewart and Ernest. The latter escaping as aforesaid with the load of liquors, went to the garage, and Prescott took them to his residence, where the liquor was deposited in the basement.

Stewart and Ernest claimed they had but seven cases and delivered only that number to the Sheriff, then disappearing with the Buick. A few days later, Noble sought out the Sheriff and with him discussed the status of the former's auto. [57]

The Sheriff delivered the auto to the Federal Agents, these proceedings were instituted Nov. 26, 1921, and hearing was had March, 1922. The evidence further is that the sacks and liquors found in the road are like those delivered to the sheriff by Stewart, Ernest and Prescott, that there was no permit for importation of the liquors, and no taxes for importation had been paid upon them, and that during the chase were some dust, wind, and tumble weeds rolling. In behalf of the intervenor, the evidence is that Stewart and Noble in the Buick brought from Canada, twenty-five cases of Canadian bottled whiskey and gin, in nineteen sacks, that twenty-five miles out of Great Falls, their gasoline failed; that by a passing rancher they sent to Noble's garage a request for delivery to

them five gallons of gasoline; that Noble took it to them in his auto, intervenor going along for the ride; that neither Noble nor intervenor had interest in, or positive knowledge that the Buick was loaded with liquors; that none of the liquors were transferred to or were in Noble's auto; that intervenor had but one arm, and no sacks were thrown from the auto; that when they fled from the officers, they thought the latter were robbers, or "highjackers"; that Noble ran off the road thinking to secure protection at the farm house, but found it vacant; that Noble and intervenor, arriving in Great Falls in the afternoon after the chase, Noble, at the garage, learned the pursuers were officers, and went home to bed and slept till next day; that three times he called at the courthouse to see the Sheriff, finally one evening finding him at the jail; that intervenor made no complaint to the police of loss of the car, but learned from the police and papers the official character of the pursuers; that Prescott allowed the liquors to be stored in his basement because the garage was a public place; that Stewart and Ernest were two sacks short, likely fallen out thru a defective door of the Buick, and Prescott went with them to look for the sacks because it was too early for breakfast or work, and for the ride.

That the two sacks of liquor found by the deputy, were thrown from Noble's auto during the chase is established by a preponderance of the evidence. Intervenor's contention that they had fallen from the Buick, and that what the officers saw, were



tumble weeds blown across the road, and accepted by them [58] for sacks when the deputy appeared with sacks found upon the road of the chase, is untenable in view of all the circumstances. It is believed the officers saw what they testified they saw.

Everything pursuant to the flight and its strategy were with knowledge of the official character of the pursuers and to escape the consequences of guilty conduct. The pursued fled before the chase started. They were on the underground route for liquors, with liquors, and beyond doubt were anticipating to avoid vigilant officers more likely to suddenly appear, than "highjackers" or robbers.

If Noble had no liquor, he had no reason to fear "highjackers," and fear of robbers was unreasonable. These parties are not of fearsome nature. The demeanor and testimony of Noble and Stewart were bold, arrogant, flippant, verging upon the insolent and defiant.

The impression created is of untrustworthiness and discredibility Stewart and Ernest had made many incriminating statements involving Noble. Both subpoenaed by the government in Noble's trial, only Stewart was called. Admitting the statements aforesaid, he jeeringly declared they were false and to deceive the officers, and with gross insolence, and palpable falsehood, sought to persuade that the officers had been in negotiations with him and Ernest for the officers' personal advantage in respect to the liquors and this auto.

Stewart thus treacherous, Ernest was called by Noble, and retracted his statements aforesaid, even as Stewart did. It is noted the statements of Stewart and Ernest incriminating Noble serve only to impeach their contrary statements at the trial, are not otherwise evidence herein.

It is significant they knew they were pursued by officers, that Stewart, Ernest and Prescott deposited the liquors in the latter's basement. If Noble was captured there was fear of search of the garage, and so the liquors were thus concealed. And the immediate return to the scene of the chase by these three was prompted not by search for the lost two sacks, or desire to ride, but to discover the fate of Noble and to serve him if practicable. [59]

If Noble had not known the officers, the natural thing would have been for him, if innocent, strong in the consciousness of it, to at once call up the Sheriff, to set both right, to recover his car.

But he did not. He first consulted counsel. Why? And only met the Sheriff after some days and without appointment or call but by personal journeys, he says, to find him.

Intervenor's interest, his pretense of fear of robbers, for it is that, his failure to notify officers because "wasn't my car" and the impression created on the witness stand, tend to restrain credit for his testimony.

For the defense it is accepted, however, that Noble did deliver gasoline to Stewart and Ernest

about 25 miles out of Great Falls, on the Canada highroad, whether or not the expedition to Canada was shared in by him. There is where Noble received the sacks of liquors. He received them in circumstances of their character and origin, of men and methods, and of time and place that would apprise any intelligent person they were being unlawfully imported, avoiding governmental knowledge, supervision, and dues, and with intent to defraud government of unpaid import taxes, internal and customs, to both of which the liquors are subject by law to the knowledge of all men. More reason had Noble to know these facts and he did know them. In brief, Noble knew the liquors were in process of smuggling from Canada. Participating to success therein, aiding Stewart and Ernest to continue their unlawful acts, removing some of the liquors, the intent, amongst others unlawful, to defraud the plaintiff of the taxes unpaid and due is imputed to him as a reasonable inference established by a preponderance of the evidence. The Court so finds.

See in respect to intent:

Lilienthal's Case, 97 U. S. 264-268.

Ellis vs. U. S. 206 U. S. 257.

U. S. vs. Kirby, 7 Wall. 486.

The auto is forfeited and condemned, and an appropriate decree will be entered.

May 25, 1922.

BOURQUIN, J. [60]

DECREE.

(Title of Court—Title of Cause.)

THIS CAUSE came on regularly for trial on the 15th day of March, 1921. The United States of America, Libelant, appeared by its attorneys, John L. Slattery, Esquire, United States Attorney, and Ronald Higgins, Esquire, Assistant United States Attorney, for the District of Montana. The libelee, Harvey Noble, and the intervenor, Charles Zuckerman, appeared by John N. Thelen, Esquire. The said cause was tried to the Court sitting without a jury, a jury having been expressly waived in open court by the respective counsel for the above-named parties. Whereupon, it was further agreed, in open court, by the said respective counsel for the above-named parties, that the evidence introduced, taken and transcribed in the criminal cause, No. 3926, United States of America, vs. Harvey Noble, should be taken and considered as evidence in this cause. Thereupon, additional evidence was submitted on behalf of the libelant and the libelee and intervenor, and after argument of counsel the cause was submitted to the Court, and was thereupon taken under advisement by the Court.

Thereafter, and on the 25th day of May, 1922, the Court being fully advised in the premises, rendered its decision herein and finds:

That all of the allegations contained in the libel of information herein are true; that the automo-

bile and tools and accessories described in the libel of information herein became forfeited to the United States of America on the 8th day of November, 1921; that the United States of America is entitled to a decree forfeiting the said automobile, tools and accessories, as of said 8th day of November, 1921.

WHEREFORE, by reason of the premises and by virtue of the law, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the automobile described in the libel of information herein, to wit: one Big Six Studebaker Automobile, Model 1919, Serial No. 295019, Engine No. C. F. 2933, Montana State License No. 19521, and one motor meter, two jacks, two hammers, three pliers, one rim wrench, one tool kit, two chains, four wrenches, one oil gun, one wheel puller, one five-gallon gasoline can, one set side curtains, one screw-driver, one chisel, two spare tires, and one [61] rim lug, be. and the same are hereby condemned and forfeited to the United States of America; and that the same be sold at public place in the City of Helena, in the State and District of Montana, at public auction, at a time and place to be set by the United States Marshal, in that behalf, for cash, by said United States Marshal for the District of Montana; that the said marshal shall give fifteen days notice of such sale by advertising in the "Montana Record-Herald," a newspaper of general circulation, printed and published in the City of Helena, in the State and District of Montana, the



same being a newspaper published nearest the said place of sale; and shall within ten days after such sale pay the proceeds thereof to the Clerk of this Court, after deducting all proper charges and costs incurred herein, to be allowed by this Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the United States of America, libelant, to have and recover of and from Harvey Noble, libelee, and from Charles Zuckerman, intervenor herein, its costs and disbursements herein, hereby taxed and allowed in the sum of ——— Dollars (\$———).

Done in open court this 29th day of May, 1922.

(Signed) BOURQUIN,  
Judge.

#### MOTION FOR A NEW TRIAL.

(Title of Court—Title of Cause.)

To J. L. Slattery, United States District Attorney:

You will please take notice that the defendant and intervenor, Charles Zuckerman, hereby moves the Court to set aside the decree of the above-entitled Court and to grant him a new trial for the following reasons:

1. That the Court erred in refusing to grant the defendant's motion for dismissal of the above-entitled action on the ground that the verdict of acquittal of Harvey Noble, Defendant, in the case of the United States of America, Plaintiff, vs. Harvey Noble, Defendant, action No. 2926, in the above-entitled court, was and is a complete bar to the action brought by the United States Gov-

ernment [62] against the above-named defendant and intervenor and libelees in the above-entitled case.

2. That the Court erred in not abiding by the verdict of acquittal of the jury in the criminal action of the United States of America, Plaintiff, vs. Harvey Noble, Defendant, as the basis for his decision in the above-entitled cause.

3. That the Court erred in not rendering and entering judgment in favor of the defendant and libelees and against the libelant in the above-entitled case.

4. That the Court erred in not rendering and entering judgment in favor of the libelees and against the libelant in the above-entitled cause.

5. That the Court erred in not holding the verdict of acquittal of the libelee, Harvey Noble, in the case of the United States of America, Plaintiff, vs. Harvey Noble, Defendant, action No. 3926, in the above-entitled Court, was not a complete bar to the above-entitled action.

6. That the Court erred in holding that the said Big Six Studebaker Automobile, tools and accessories, were subject to confiscation in the above-entitled action under the laws of the United States.

7. That the Court erred in not sustaining the motion of the defendant and intervenor for the dismissal of the above-entitled action on the ground that sec. 26 of the Volstead Act did repeal sec. 3450 of the Internal Revenue Laws and that the Court had no jurisdiction to try the above-entitled cause.

8. That the Court erred in holding that he had jurisdiction to try the above-entitled cause and that sec. 26 of the Volstead Act did not repeal sec. 3450 of the Internal Revenue Laws.

Said motion is based upon papers, pleadings and files herein and a bill of exceptions hereinafter to be presented, served and filed.

FREEMAN, THELEN & FRARY,  
Attorneys for Defendant. [63]

Service of the foregoing notice of motion for a new trial and receipt of copy accepted this 20th day of June, A. D. 1922.

JOHN L. SLATTERY,  
Attorney for Libelant.

Filed the 20th day of June, A. D. 1922. C. H. Garlow, Clerk.

(Title of Court—Title of Cause.)

#### STIPULATION.

It is hereby stipulated and agreed by and between the libelant and the defendant and intervenor, thru their respective counsel of record, that the defendant and intervenor may have to and including thirty (30) days from date hereof in which to present, serve and file his bill of exceptions.

JOHN L. SLATTERY,  
Attorney for Libelant.

Dated the 20th day of June, A. D. 1922.

Filed the 20th day of June, 1922. C. H. Garlow,  
Clerk.

FREEMAN, THELEN & FRARY,  
Attorney for Defendant and Intervenor.

Thereafter, on the 20th day of June, 1922, the Honorable George Bourquin, Judge, on application of defendant and intervenor, and pursuant to said stipulation, made an order in the Court minutes extending the time of defendant which to file his bill of exceptions, and which said order is in words and figures as follows, to wit:

No. 965.

UNITED STATES

vs.

ONE STUDEBAKER AUTO, HARVEY NOBLE,  
et al.

Pursuant to stipulation filed herein, and on motion of J. W. Freeman, Esq., attorney for intervenor, Zuckerman, Court ordered that the intervenor be granted thirty (30) days from the date hereof, to prepare, serve and file his bill of exceptions, the District Attorney being present and consenting thereto.

Entered in open court June 20, 1922.

C. R. GARLOW,

Clerk. [64]

**Order Settling and Allowing Bill of Exceptions.**

AND NOW IN FURTHERANCE OF JUSTICE, and that right may be done, the defendant and intervenor, Charles Zuckerman, tenders and presents the foregoing as his bill of exceptions in this case, to the action of the Court, and prays that the same be settled and allowed and signed and sealed by the Court, and made a part of the record, and the same is accordingly done this 1st day of Aug. 1922.

BOURQUIN,  
District Judge.

Service of foregoing bill of exceptions acknowledged and copy received this 20th day of July, 1922.

JOHN L. SLATTERY,  
United States District Attorney.

Received by the clerk and delivered to the Court this —— day of July, 1922.

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Clerk.

Filed Aug. 1, 1922. C. R. Garlow, Clerk. [65]

That on Mar. 15, 1922, Defendant's Exhibit "A," referred to in the bill of exceptions herein, was introduced at the trial of said cause and filed therein, being in the words and figures following, to wit:



**Defendant's Exhibit "A."**

THIS MORTGAGE, Made this 22d day of Sept. in the year Nineteen Hundred and twenty-one by H. R. Noble resident of the County of Cascade in the State of Montana, Mortgagor, to Charles Zuckerman resident of the County of Cascade in the State of Montana, Mortgagee;

WITNESSETH, that the said Mortgagor, for and in consideration of the sum of One Thousand and No/100 (\$1000.00) Dollars, hereby mortgages unto the said mortgagee all that certain personal property now in the possession of the said Mortgagor at Great Falls, in the County of Cascade and State of Montana, which is particularly described as follows, to wit:

One (1) Studebaker Touring car, seven passenger, 1919, Model Serial No. 2933, License No. 19521.

Said property above described being all of the property of the kind described, owned by the mortgagor at the time of making this mortgage, and this mortgage includes, also, all property of like kind, hereafter and during the life of this mortgage, acquired by the mortgagor by either increase, or purchase, or by exchange, or substitution for property herein described, also all of said mortgagor's undivided interest in all the crops of every kind and nature and description, including grass, which have been, or may hereafter be sown, grown, cultivated or harvested during the year

A. D. 191—, on the following described real estate, situated, lying and being in the County of — and State of Montana, to wit: — of Section No. —, Township No. —, Range No. —.

As security for the payment of a certain promissory note of even date herewith executed and delivered by the said mortgagor to the said mortgagee, in words and figures as follows:

“1,000.00      Great Falls, Mont. Sept. 22, 1921.

Six Months after date, we, or either of us, promise to pay to the order of Charles Zuckerman One Thousand and no/100 Dollars, for value received, negotiable and payable at Great Falls, Montana, with interest at [66] the rate of ten per cent per annum from — until paid, and reasonable attorney's fees. The makers and endorsers hereby waive presentment, demand, protest and notice hereof.

Discount —.

No. —.

Due —.

H. R. NOBLE.

And also as security for such further payment and additional sums of money as may, from time to time, hereafter during the life of this instrument, be advanced and loaned by said mortgagee to said mortgagor, together with the interest thereon, which said further advances when made are to be evidenced by notes from said mortgagor to said mortgagee and are to be as fully secured hereby as though the same were specially described

and set forth herein, but for no greater amount, however, than One Thousand and no/100 Dollars.

Provided that the said Mortgagor may remain in possession of said personal property until possession thereof is described by the said Mortgagee or his assigns.

But if said Mortgagee or his assigns shall, at any time, desire the possession of said property, or any part thereof, said Mortgagee or his assigns, and the Sheriff of any County of the State, in which said property or any part thereof may be, are, and each of them is, hereby authorized to take possession of said property, or any part thereof, and sell the same, either at public or private sale, without demand of payment and without notice of said Mortgagor, or to any other persons, of such sale; the said Mortgagor hereby expressly waiving all right to have said property, or any part thereof, sold at public sale, and also waiving all right to any previous demand of payment and to any notice to said mortgagor or to any other person, of such sale. Provided, that whenever the power of sale, herein conferred, shall be executed by a Sheriff, notice of the time and place of such sale shall be posted in three public places in said County at least five days prior to the sale, but such sale may be either public or private. And the person making [67] any sale hereunder, on behalf of said Mortgagee or his assigns, is hereby authorized to retain, out of the proceeds therefrom said principal and interest, or such portion thereof as may then be unpaid, whether due or not, together with

reasonable attorney's fees and the costs and charges of making such sale; the overplus, if any, to be paid to said Mortgagor. And the said Mortgagor hereby consents to the purchase of said property, or any part thereof, by said Mortgagee or his assigns, at any sale hereunder.

It is further agreed in event this mortgage covers a crop, either cereals, roots, or otherwise, either sown, planted or growing, or to be sown, planted or grown, that when the said property hereby mortgaged is gathered or harvested, the said mortgagee, or his assigns, shall be entitled to the immediate possession of the same, and shall have the right to transport and haul the same from the premises wherein the same have been grown, and to sell and dispose of the same for the best price obtainable therefor, and that the cost and expenses of such hauling and transporting shall be borne and paid by said mortgagor, and shall be covered by the lien of this mortgage, and that until such property is so sold and disposed of by said mortgagee, or assigns, the lien of this mortgage upon the said property, wherever the same may be, shall continue and remain in full force and effect, it being understood that any moneys received by said mortgage, or assigns, upon the sale of said property, less the amounts secured by these presents shall be returned to the said mortgagor, heirs or assigns.

It is further agreed that the powers conferred by this mortgage are in addition to and not in substitution of the right of the mortgagee to foreclose

88 *One Big Six Studebaker Automobile, etc., et al.,*  
this mortgage by suit as in the case of a mortgage on  
real estate.

The mortgagor hereby declares and represents  
to the mortgagee that the mortgagor owns said  
property, and possesses lawful right and authority  
to sell, mortgage and dispose of the same, and that  
[68] the same is free and clear of all liens and  
encumbrances, and the loan secured herein is ob-  
tained by these representations.

The provisions hereof shall be binding upon the  
heirs, personal representatives and assigns of the  
respective parties hereto.

In witness whereof, the said Mortgagor has here-  
unto set his hand and seal the day and year first  
above written.

(Signed) H. R. NOBLE.

Executed in the presence of

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State of Montana,  
County of Cascade,—ss.

On this 22d day of Sept., in the year 1921, before  
me, Edyth Calcott, a notary public for the State  
of Montana, personally appeared H. R. Noble,  
known to me to be the person whose name is sub-  
scribed to the within instrument, and he acknowl-  
edged to me that he executed the same.

In witness whereof I have hereunto set my hand



and affixed my notarial seal the day and year in this Certificate first above written.

[Seal]

EDITH COLCOTT,  
Notary public for the State of Montana, Residing  
at Great Falls, Montana.

My commission expires Jan. 28, 1924.

### INDIVIDUAL AFFIDAVIT.

State of Montana,  
County of Cascade,—ss.

Charles Zuckerman, the mortgagee named in the foregoing mortgage of personal property, being duly sworn, deposes and says that the said mortgage is made in good faith to secure the amount named therein, and without any desire to hinder, delay or defraud [69] creditors.

(Signed) CHARLES ZUCKERMAN.

Subscribed and sworn to before me this 22d day of Sept. A. D. 1921.

[Seal]

EDITH COLCOTT,  
Notary Public for the State of Montana, Residing  
at Great Falls, Montana.

My commission expires Jan. 28th, 1924.

I hereby certify that I have this day received a true and correct copy of the foregoing chattel mortgage.

(Signed) H. R. NOBLE.

Dated Sept. 22d, 1921.

State of Montana,  
County of Cascade,—ss.

I, John E. Moran, County Clerk and Recorder in and for said County and State aforesaid, do hereby certify the above and foregoing to be a full, true, and correct copy of the original Chattel Mortgage H. R. Noble to Charles Zuckerman as the same appears on file in this office, No. 22008, Chattel Mortgage files.

In witness whereof, I have hereunto set my hand and affixed the seal of said County this 14th day of March, 1922.

[Seal] JOHN E. MORAN,  
County Clerk and Recorder in and for Cascade  
County, Montana.

By Ernest Polutnik,  
Deputy.

Filed Mar. 15, 1922. C. R. Garlow, Clerk U. S.  
District Court, District of Montana. [70]

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Thereafter, on Sept. 25, 1922, petition for writ of error was duly filed herein, being in the words and figures following, to wit:

In the District Court of the United States for the  
District of Montana.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE BIG SIX STUDEBAKER AUTOMOBILE,  
Tools and Accessories, and HARVEY  
NOBLE,

Libelees,

and

CHARLES ZUCKERMAN,

Defendant and Intervenor.

**Petition for Writ of Error.**

Now comes Charles Zuckerman, defendant and intervenor herein, and says that on or about the 29th day of May, 1922, this Court entered judgment herein in favor of the Libelant and against the defendant and intervenor, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of this defendant and intervenor, all of which will be more fully and in detail appear from the assignment of errors which is filed with this petition.

Wherefore, defendant and intervenor prays that a writ of Error may issue in his behalf to the United States Circuit Court of Appeals for the Ninth Judicial District, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly

92 *One Big Six Studebaker Automobile, etc., et al.*,  
authenticated, may be sent to the said Circuit Court  
of Appeals.

Dated this 20th day of September, 1922.

FREEMAN, THELEN & FRARY,  
Attorneys for Defendant and Intervenor.  
Service accepted Sept. 25, 1922.

JOHN L. SLATTERY,  
U. S. Attorney.

Filed Sept. 25, 1922. C. R. Garlow, Clerk. [71]

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Thereafter, on Sept. 25, 1922, assignment of  
errors was duly filed herein, being in the words and  
figures following, to wit: [72]

In the District Court of the United States, for the  
District of Montana.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE BIG SIX STUDEBAKER AUTOMOBILE,  
Tools and Accessories, and HARVEY  
NOBLE,

Libelees,

and

CHARLES ZUCKERMAN,

Defendant and Intervenor.

**Assignment of Errors.**

Comes now Charles Zuckerman, defendant, in the  
above numbered and entitled cause and in connec-

tion with his petition for writ of error in this cause assigns the following errors which the defendant avers occurred in the trial thereof and upon which he relies to reverse the judgment entered herein as appears of record:

1. That the Court erred in not sustaining the motion of the defendant and intervenor for dismissal of the above-entitled action on the ground that the acquittal of Harvey Noble, defendant, in the case of the United States of America, Plaintiff, vs. Harvey Noble, Defendant, action No. 3926 in the above-entitled court, was and is a complete bar to the action brought by the United States Government against the above-named defendant and intervenor and libelees in the above-entitled case.

2. That the Court erred in not abiding by the verdict of acquittal of the jury in the criminal action of the United States of America, Plaintiff, vs. Harvey Noble, [73] defendant, as the basis for his decision in the above-entitled cause.

3. That the Court erred in not rendering and entering judgment in favor of the defendant and intervenor and libelees and against the libelant in the above-entitled case.

4. That the Court erred in not rendering and entering judgment in favor of the libelees and against the libelant in the above-entitled cause.

5. That the Court erred in not holding that the verdict of acquittal of the libelee, Harvey Noble, in the case of the United States of America, Plaintiff, vs. Harvey Noble, Defendant, action No. 3926



in the above-entitled court, was not a complete bar to the above-entitled action.

6. That the Court erred in holding that the said Big Six Studebaker Automobile, tools and accessories were subject to confiscation in the above-entitled action under the laws of the United States.

7. That the Court erred in not sustaining the motion of the defendant and intervenor for dismissal of the above-entitled action on the ground that Sec. 26 of the Volstead Act did repeal Sec. 3450 of the Internal Revenue Laws and that the court had no jurisdiction to try the above-entitled cause.

8. That the Court erred in holding that he had jurisdiction to try the above-entitled cause and that Sec. 26 of the Volstead Act did not repeal Sec. 3450 of the Internal Revenue Laws. [74]

9. The Court erred in not holding that under the facts in this case as set forth in the Court's opinion, that Section No. 3450 of the Revised Statutes was not superseded by the National Prohibition Act in that the Court found that the whiskey that the automobile in question was used to remove, was Canadian whiskey and gin.

10. The Court erred in not holding that the whiskey and gin removed in the said automobile, if at all, had not been manufactured in an industrial plant, and therefore not taxable under Title 3 of the National Prohibition Act.

11. The Court erred in not holding that the facts of this particular case show a violation of the National Prohibition Act and arose solely thereunder, if at all.

{ WHEREFORE, the defendant and intervenor prays that judgment of the said Court be reversed.

FREEMAN, THELEN & FRARY,

Attorneys for the Defendant and Intervenor.

Service accepted Sept. 25, 1922.

JOHN L. SLATTERY,

U. S. Attorney.

Filed Sept. 25, 1922. C. R. Garlow, Clerk. [75]

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Thereafter, on Sept. 25, 1922, an order allowing writ of error was duly filed and entered herein, being in the words and figures following, to wit:  
[76]

In the District Court of the United States, for the  
District of Montana.

UNITED STATES OF AMERICA,

Libellant,

vs.

ONE BIG SIX STUDEBAKER AUTOMOBILE,  
Tools and Accessories, and HARVEY  
NOBLE,

Libelees,

and

CHARLES ZUCKERMAN,

Defendant and Intervenor.

**Order Allowing Writ of Error.**

This 25th day of September, 1922, came the defendant above named by his attorneys and filed herein and presented to the Court his petition pray-

ing for the allowance of a writ of error and assignment of errors intended to be urged by him; praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial District, and that such order and further proceedings may be had as may be proper in the premises.

In consideration whereof the Court does allow the writ of error.

It is further ordered that the amount of the security herein to be furnished by the said defendant and intervenor be, and the same is hereby, fixed at the sum of \$300, and that upon the making and filing with the Clerk of this court of a good and sufficient undertaking in said sum by the said defendant, all further proceedings herein be superseded and stayed until the final determination of said appeal by the said United States Circuit Court of Appeals, and until [77] the further order of this Court.

Dated this 25th day of Sept., 1922.

BOURQUIN,

Judge.

Filed Sept. 25, 1922. C. R. Garlow, Clerk. [78]

Thereafter, on Sept. 25, 1922, a supersedeas bond was duly filed herein, being in the words and figures following, to wit: [79]

In the District Court of the United States, for the  
District of Montana.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE BIG SIX STUDEBAKER AUTOMOBILE,  
Tools and Accessories, and HARVEY  
NOBLE,

Libelees,

and

CHARLES ZUCKERMAN,

Defendant and Intervenor.

**Supersedeas Bond.**

KNOW ALL MEN BY THESE PRESENTS, that whereas, at a regular term of the District Court of the United States for the District of Montana, in a suit pending in said court, between the United States of America, as libelant, and One Big Six Studebaker Automobile, tools and accessories and Harvey Noble, as libelees, and Charles Zuckerman, as defendant and intervenor, cause No. 965 in the law docket of the said court, final judgment was rendered against Charles Zuckerman on the 29th day of May, 1922, decreeing that said One Big Six Studebaker Automobile, Model 1919, Serial No. 295019, Engine No. C. F. 2933, Montana State License No. 19521, and one motor meter, two jacks,

two hammers, three pliers, one rim wrench, one tool kit, two chains, four wrenches, one oil gun, one wheel puller, one five-gallon gasoline can, one set side curtains, one screw-driver, one chisel, two spare tires, and one rim lug, be, and the same are hereby condemned and forfeited to the United States of America; and that the same be sold at a public place in the City of Helena, in the State and District of Montana, at public auction, at a time and place to be set by the United States Marshal, in that behalf, for cash, by said United States marshal for the District of Montana; and for costs, amounting to the sum of \$18.00 with interest thereon at the rate of eight per cent per annum from May 29th, 1922, and the said Charles Zuckerman has obtained a writ of error and filed a copy thereof in the Clerk's office of the said court to reverse the judgment of the said court in the aforesaid suit, and a citation directed to the said United States of America, defendant in error, citing it to appear before the United States Circuit Court of Appeals for the Ninth Circuit to be [80] holden at San Francisco, in the State of California, according to law, within thirty (30) days from the date hereof.

Now, therefore, in consideration of the premises and of such appeal, the undersigned Fred A. Woehner and W. S. Frary, as sureties, do hereby undertake in the sum of ——— dollars, that the said Charles Zuckerman will prosecute his said writ of error to effect and answer all damages and costs if he fails to make his plea good, and if the judg-



ment appealed from be affirmed, or the appeal dismissed, the said plaintiff in error will pay the amount directed to be paid by said judgment or order and all damages and costs which may be awarded against the plaintiff in error upon the said appeal.

FRED A. WOEHNER.

W. S. FRARY.

State of Montana,  
County of Cascade,—ss.

On the 25th day of September, 1922, personally appeared before me Fred H. Woehner and W. S. Frary, respectively known to me to be the persons described in and who duly executed the foregoing instrument as parties thereto and respectively acknowledged, each for himself, that they executed the same as their free act and deed for the purposes therein set forth.

And the said Fred H. Woehner and W. S. Frary, being respectively by me duly sworn, says, each for himself and not one for the other, that he is a resident and householder of the said County of Cascade and that he is worth the sum of \$300 over and above his just debts and legal liability and property exempt from execution.

FRED A. WOEHNER.

W. S. FRARY.

Subscribed and sworn to before me this 25th day of September, A. D., 1922.

[Seal]

JOHN M. THELEN,

Notary Public for the State of Montana, Residing at Great Falls, Montana.

100 *One Big Six Studebaker Automobile, etc., et al.,*

My commission expires September 13, 1925.  
[81]

The within bond is approved both as to sufficiency and form this 25th day of September, 1922.

BOURQUIN,

Judge.

Filed Sept. 25, 1922. C. R. Garlow, Clerk. [82]

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Thereafter, on Sept. 25, 1922, citation was duly issued herein, which original citation is hereunto annexed and is in the words and figures following, to wit: [83]

In the District Court of the United States for the  
District of Montana.

UNITED STATES OF AMERICA,

Libellant,

vs.

ONE BIG SIX STUDEBAKER AUTOMOBILE,  
Tools and Accessories, and HARVEY  
NOBLE,

Libelees,

and

CHARLES ZUCKERMAN,

Defendant and Intervenor.

**Citation.**

United States of America,—ss.

The President of the United States to the United  
States of America, GREETING:

You are hereby cited and admonished to be and

appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, in the State of California, within thirty days from the date of this Writ, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Montana, wherein the United States of America is plaintiff and libelant, and One Big Six Studebaker Automobile, tools and accessories, and Harvey Noble are libelees, and Charles Zuckerman is defendant and intervenor, the said United States of America being defendant in error, to show cause, if any there be why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable GEO. M. BOURQUIN, Judge of the District [84] Court of the United States, for the District of Montana, and the seal of the said District Court this 25th day of September, 1922.

BOURQUIN,  
United States District Judge Presiding in the said  
District Court of the State of Montana.

Attest: \_\_\_\_\_, Clerk.

FREEMAN, THELEN & FRARY,

Attorneys for Defendant and Intervenor. [85]

Service of the foregoing citation is hereby admitted this 25th day of September, 1922.

JOHN L. SLATTERY,  
United States District Attorney. [86]

[Endorsed]: No. 965. In the District Court of the United States for the District of Montana. United States of America, Libelant, vs. One Big Six Studebaker Automobile et al., Libelees, and Charles Zuckerman, Intervenor. Citation. Filed Sept. 25, 1922. C. R. Garlow, Clerk. By H. H. Walker, Deputy.

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Thereafter, on Sept. 25, 1922, a writ of error was duly issued herein, which original writ is hereunto annexed and is in the words and figures following, to wit: [87]

In the District Court of the United States for the  
District of Montana.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE BIG SIX STUDEBAKER AUTOMOBILE,  
Tools and Accessories, and HARVEY  
NOBLE,

Libelees,

and

CHARLES ZUCKERMAN,

Defendant and Intervenor.

**Writ of Error.**

To the President of the United States of America,  
and to the Judge of the District Court of the  
United States for the District of Montana,  
GREETING:

Because in the record and proceedings and also

in the rendition of the judgment of a plea which is in the said District Court of the United States, for the District of Montana, before you, between the United States of America, Libelant, and One Big Six Studebaker Automobile, tools and accessories, and Harvey Noble, libelees, and Charles Zuckerman, defendant and intervenor, manifest errors have happened to the great damage of the said Charles Zuckerman, defendant and intervenor, as is said and appears by the answer and the record herein, and it being fit that the errors, if any there have been, should be duly corrected and full and speedy justice done to the party aforesaid, in this behalf, you are hereby

Comanded if judgment be therein given, that thereunder your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the United States [88] Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, State of California, together with this Writ so that you may have the same at the City of San Francisco, State of California, within thirty days from the date of this writ in the said United States Circuit Court of Appeals, to be then and there held; that the record and proceedings aforesaid may be inspected, and the said United States Circuit Court of Appeals may cause further to be done therein to correct said errors, if any, and to do what of right and according to the law and custom of the United States should be done.



WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States of America, this 25th day of September, in the year of our Lord one thousand nine hundred and twenty-two.

[Seal]

C. R. GARLOW,

Clerk of the District Court of the United States,  
for the District of Montana.

By H. H. Walker,

Deputy. [89]

### RETURN TO WRIT OF ERROR.

United States of America,

District of Montana,—ss.

In obedience to the command of the within Writ, I herewith transmit to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereto subscribe my name and affix the seal of the United States District Court for the District of Montana, this 18th day of October, A. D. 1922.

[Seal]

C. R. GARLOW,

Clerk U. S. District Court, District of Montana.

[90]

Due service of the within writ of error is hereby admitted this 25th day of September, 1922.

JOHN L. SLATTERY,

United States District Attorney. [91]

[Endorsed]: In the District Court of the United States for the District of Montana. United States

of America, Libelant, vs. One Big Six Studebaker Automobile et al., Libelees, and Charles Zuckerman, Intervenor. Writ of Error. Filed Sept. 25, 1922. C. R. Garlow, Clerk. By H. H. Walker, Deputy.

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**Certificate of Clerk U. S. District Court to Transcript of Record.**

United States of America,  
District of Montana,—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 91 pages, numbered consecutively from 1 to 91, inclusive, is a full, true and correct transcript of the record and all proceedings had in the within entitled case, as appears from the original records and files of said case in my custody as such Clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original Writ of Error and citation issued in said case.

I further certify that the costs of the transcript of record amount to the sum of Thirty-six and 65/100 Dollars, and have been paid by the plaintiff in error.

Witness my hand and the seal of said court at Helena, Montana, this 18th day of October, A. D. 1922.

[Seal]

C. R. GARLOW,  
Clerk. [92]

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[Endorsed]: No. 3934. United States Circuit Court of Appeals for the Ninth Circuit. One Big Six Studebaker Automobile, Tools and Accessories, and Harvey Noble, Plaintiffs in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Montana.

Filed October 23, 1922.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.